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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 33

[Docket No. RM98–4–000]

Revised Filing Requirements (April 16, 1998)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is proposing to revise 18 CFR part 33 to update the filing requirements for applications under part 33, including public utility mergers. The Commission expects that, by providing applicants more detailed guidance for preparing applications, the proposed filing requirements will assist the Commission in determining whether applications under section 203 of the Federal Power Act are consistent with the public interest and will provide more certainty and expedition in the Commission's handling of such applications.

DATES: Interested entities may file comments no later than August 24, 1998.

ADDRESSES: File comments with the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, D.C. 20426.

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I. Overview

In this notice of proposed rulemaking (NOPR), the Federal Energy Regulatory Commission (Commission) is proposing to revise 18 CFR Part 33 by specifying clear and succinct filing requirements for applications submitted pursuant to § 203 of the Federal Power Act (FPA),[1] including public utility mergers.[2] Following issuance of the Merger Policy Statement in 1996,[3] § 203 applications have varied widely in the quantity and quality of information they have included, particularly with respect to competitive market power analyses and the supporting data. The proposed filing requirements address this problem by providing detailed guidance to applicants. This rulemaking proceeding is intended to provide greater certainty as to what is needed in § 203 applications, thereby helping applicants to organize and prepare their applications more quickly and efficiently and also to better predict the outcome of the Commission's evaluation of their applications. In providing more certainty, the filing requirements are also intended to facilitate a prompt, procedurally efficient and substantively accurate decision making process by the Commission to ensure that mergers and other jurisdictional transactions under § 203 are consistent with the public interest in rapidly changing electric power markets. In addition, the NOPR is intended to lessen regulatory burdens on the industry by eliminating outdated and unnecessary filing requirements, streamlining the filing requirements for mergers that do not raise competitive concerns, and proposing the use of a computer simulation model to facilitate a prompt and highly accurate method of market power analysis by both applicants and the Commission. The Commission expects that, by assisting the Commission and applicants in determining whether applications under § 203 are consistent with the public interest and providing more certainty and expedition in applicants' preparation and the Commission's handling of such applications, the proposed filing requirements can lessen overall the regulatory burden associated with the § 203 application process.

The Policy Statement set forth procedures, criteria and policies for evaluating proposed mergers. The Policy Statement set out the three factors the Commission will consider when analyzing a merger proposal: effect on competition; effect on rates; and effect on regulation. The Commission also stated its intention to issue a NOPR to set out specific filing

[1] 16 U.S.C. 824b.

[2] When the Commission refers to a ''merger'' in this document, it also includes ''consolidations.'' Section 203 of the FPA requires Commission authorization for mergers or consolidations involving the jurisdictional facilities of a public utility. It also requires Commission authorization for the sale, lease or other disposition of jurisdiction facilities with a value in excess of $50,000, and for the purchase by a public utility of the securities of another public utility.

[3] Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *order on reconsideration*, 78 FERC ¶ 61,321 (1997) (Policy Statement).

requirements consistent with the Policy Statement.[4] That is the primary purpose of the NOPR we are issuing today.

In the period since the issuance of the Policy Statement, the Commission has gained valuable experience evaluating various types of mergers using the guidelines in the Policy Statement as the framework for our analysis. We have acted on 15 significant merger applications since the Policy Statement was issued. Some of these were mergers of adjacent vertically-integrated electric companies. Others involved utilities that were not currently interconnected, but planned to integrate their electric systems post-merger. Yet others involved mergers of electric companies with natural gas companies. The Commission has devoted substantial resources to considering whether a proposed merger would significantly increase horizontal or vertical market power, thereby indicating potential competitive concerns. As we have gained experience in reviewing the issues related to competition presented by these mergers, we have fine-tuned the horizontal market power analysis set out in the Policy Statement and have adopted a vertical market power analysis.[5] From this experience, we propose filing requirements that will enable all parties to more efficiently address the types of issues that have arisen in the applications filed since the issuance of the Policy Statement, as well as issues that will undoubtedly arise as the industry continues to make the transition to a more competitive marketplace.

Specifically, the NOPR addresses five areas of merger policy and the processing of applications: (1) it reaffirms the Commission's horizontal market power analysis and proposes specific filing requirements for horizontal mergers consistent with the Policy Statement's Appendix A analysis; [6] (2) it proposes a vertical market power analysis and accompanying filing requirements for mergers that raise vertical market power concerns that are consistent with our existing approach to examining vertical mergers; [7] (3) it proposes streamlined filing requirements and lesser information burden for mergers that raise no competitive concerns; (4) it sets out a specific computer simulation model for debate and discussion, and asks for industry comment on this particular model and on the use of modeling in general; and (5) it proposes to eliminate certain filing requirements in Part 33 that are outdated or no longer useful to the Commission in analyzing mergers. In the course of addressing these five areas, the NOPR proposes to reorganize Part 33 so that users of the regulations can quickly find those specific requirements that apply to the merger in which they are interested.

II. Background

Part 33 of the Commission's regulations specifies the filing requirements for applications under § 203 of the FPA.[8] Pursuant to § 203, Commission authorization is required for public utility mergers and consolidations and for public utilities' acquisition or disposition of jurisdictional facilities. Section 203(a) of the FPA provides, in pertinent part, that:

> No public utility shall sell, lease or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so.

Section 203 provides that the Commission shall approve such transactions if they are consistent with the public interest. The Commission's Part 33 filing requirements specify the information that is necessary for the Commission to determine whether a proposed transaction involving the disposition of jurisdictional facilities by a public utility satisfies this statutory criterion.

As a general matter, Part 33 requires a description of the corporate attributes of the party or parties to the proposed transaction (a purchase, sale, lease, or other disposition, merger, or consolidation of jurisdictional facilities, or purchase or other acquisition of the securities of a public utility) and the facilities or other property involved in the transaction. Additional information required includes the applicants' proposed accounting treatment of the transaction, statements as to the effect of the transaction on current energy contracts, and the applicants' showing that the transaction will be consistent with the public interest.

As noted previously, one of the factors the Commission considers when analyzing whether a merger proposal is consistent with the public interest is the effect on competition. The Policy Statement adopts the Department of Justice (DOJ)/Federal Trade Commission (FTC) 1992 Horizontal Merger Guidelines (Guidelines) [9] as the analytical framework for examining horizontal market power concerns. The Guidelines set forth a five-step merger analysis: (1) define markets likely to be affected by the merger and measure the concentration and the increase in concentration in those markets; (2) assess whether the merger, in light of market concentration and other factors that characterize the market, raises concern about potential adverse competitive effects; (3) assess whether entry could mitigate the adverse effects of the merger; (4) assess whether the merger results in efficiency gains not achievable by other means; and (5) assess whether, absent the merger, either party to the merger would likely fail, causing its assets to exit the market.[10]

The Policy Statement also describes an analytical screen that is intended to allow early identification of mergers that do not raise competitive concerns. The Commission believes the screen produces a reliable, conservative analysis of the competitive effects of proposed mergers. As part of the screen analysis, the Policy Statement requires generally that the applicants define product and geographic markets that are likely to be affected by the proposed merger and measure the concentration in those markets. The Policy Statement suggests a way of defining geographic markets based on identifying feasible alternative suppliers to the merged firm—the delivered price test. The concentration of potential suppliers included in the market is then measured by the Herfindahl-Hirschman Index (HHI) and used as an indicator of the potential for market power.[11] We describe the Policy Statement's

[4] Policy Statement at 30,111 n.3.

[5] *See*, Enova Corporation and Pacific Enterprises, 79 FERC ¶ 61,372 (1997) (*Enova*).

[6] Policy Statement at 30,128.

[7] PG&E Corporation and Valero Energy Corporation, 80 FERC ¶ 61,041 (1997) (*PG&E/Valero*); and Enron Corporation, 78 FERC ¶ 61,179 (1997) (*Enron*).

[8] 16 U.S.C. 824b.

[9] U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, 57 FR 41,552 (1992), *revised*, 4 Trade Reg. Rep. (CCH) ¶ 13,104 (April 8, 1997).

[10] Policy Statement at 30,118.

[11] The Policy Statement addresses three ranges of market concentration: (1) an unconcentrated post-merger market—if the post-merger HHI is below 1000, regardless of the change in HHI the merger is unlikely to have adverse competitive effects; (2) a moderately concentrated post-merger market—if the post-merger HHI ranges from 1000 to 1800 and the change in HHI is greater than 100, the merger potentially raises significant competitive concerns; and (3) a highly concentrated post-merger market—if the post-merger HHI exceeds 1800 and the change in the HHI exceeds 50, the merger potentially raises significant competitive concerns; if the change in HHI exceeds 100, it is presumed that the merger is likely to create or enhance market power.

approach to analyzing the effect on competition in more detail below.

The Policy Statement states that the Commission will examine the second factor, the effect on rates, by focusing on ratepayer protections designed to insulate consumers from any harm resulting from the merger. We directed merger applicants to attempt to negotiate such measures with their customers before filing merger applications.

Finally, the Policy Statement sets forth a third factor for examination, the effect on regulation, as it relates both to state regulation and to the potential shift in regulation from the Commission to the Securities and Exchange Commission (SEC), the latter as the result of a merger creating a registered public utility holding company. With respect to a merger's effect on state regulation, we stated in the Policy Statement that where the state commissions have authority to act on the merger, the Commission intends to rely on them to exercise their authority to protect state interests. With respect to shifts of regulatory authority from this Commission to the SEC, the Policy Statement explains that, unless applicants commit themselves to abide by this Commission's policies with regard to affiliate transactions, we will set the issue for hearing.

Below, we propose filing requirements that are consistent with the Policy Statement. We also propose ways to update and streamline our current filing requirements that will help to expedite and better focus applications and our review processes.

III. Discussion

A. General

As stated earlier, the Commission is examining its filing requirements for transactions requiring our authorization under § 203 of the FPA in light of the fundamental changes occurring in the electric utility industry and the regulation of the industry. First, the Commission believes that a portion of the information that has historically been required for all § 203 applications is no longer needed for those applications that involve routine dispositions of jurisdictional facilities, and, accordingly, we propose to eliminate certain filing requirements. Second, because of the proliferation of utility mergers and the growing importance of analyzing the competitive effects of such mergers on emerging competitive markets, the Commission believes that more descriptive filing requirements are needed. Finally, we propose to reorganize and clarify certain of our regulations under Part 33 in order to enhance the usefulness of those regulations. The goal of each of these measures is to streamline and clarify our filing requirements, make our processing of § 203 applications more efficient and timely, and provide greater certainty to the industry regarding the Commission's probable action on applications.

B. Proposed Revisions to Part 33—Basic Information Requirements

Part 33 currently contains twelve basic information requirements (§ 33.2(a) through (l)) and nine exhibits (§ 33.3 Exhibits A through I) that an applicant must file. Some of these requirements overlap. For example, §§ 33.2(I) and 33.3 Exhibit G both concern applications filed with state commissions and can be consolidated. Other information requirements are no longer relevant to our review of applications filed under this part. An example is § 33.3 Exhibit A, which concerns resolutions by applicants' directors authorizing the transaction for which Commission approval is requested. We do not believe we need this information in order to determine whether a transaction is consistent with the public interest. Also, a number of public utilities are exempt from the record-keeping requirements of the Commission's Uniform System of Accounts at the current §§ 33.2(g) and 33.3 Exhibits C, D, E and F, which relate to financial statements and account balances. Accordingly, we are proposing to streamline our Part 33 regulations to eliminate these unnecessary or inapplicable information requirements, combine sections that request duplicative information and direct our accounting requirements only to those applicants subject to the Commission's Uniform System of Accounts.

We are further proposing to eliminate entirely the current § 33.10. The 45 day time limit set forth in that section for Commission action, which is not a requirement under the statute, is no longer feasible in light of the increasing complexity of § 203 applications being filed, especially merger and other industry restructuring transactions.[12] In addition, proposed § 33.6 incorporates the requirement of the current § 33.2(l) to file a form of notice and would require submission of the notice in electronic format. In addition to these modifications, discussed below are other proposed basic information requirements under Part 33 that reflect our current way of analyzing § 203 applications.[13]

Proposed § 33.1—applicability—revises the current § 33.1 to state succinctly that the requirements of Part 33 apply to public utilities seeking authority for any transaction requiring Commission authorization under § 203.

No change is proposed in § 33.2(b)—authorized representative—except that the phone and fax numbers of the person authorized to receive communications regarding the application, which are already voluntarily provided by nearly all applicants, would be required. This subsection also proposes that E-mail addresses be provided.

Proposed § 33.2(c)—description of the applicant—incorporates the requirements of current § 33.2(c) and (k) and Exhibit B and requires a description of the applicant's business activities, corporate affiliations, common officers with other parties to the transaction, and jurisdictional customers. Organizational charts are not specifically required under our current regulations; the narrative descriptions currently required to be filed generally are more clearly depicted in chart form. As a result, we propose that organizational charts be filed.

Proposed § 33.2(d)—description of the jurisdictional facilities—requires a general description of the applicant's jurisdictional facilities.

Proposed § 33.2(e)—description of the proposed transaction—incorporates the requirements of current § 33.2(d), (e), (f) and (h) requiring a description of the proposed transaction for which Commission authorization is sought, including all parties to the transaction, the jurisdictional facilities involved or affected by the transaction, the consideration for the transaction,[14] and the effect of the transaction on the applicant's jurisdictional facilities.

Proposed § 33.2(f)—contracts related to the proposed transaction—incorporates the requirements of current Exhibit H. No other change is proposed.

Proposed § 33.2(g)—the applicant's public interest statement—includes the requirements for applicants to address the factors that the Commission considers in determining whether a

[12] Although we are proposing to eliminate this section of our Part 33 regulations, the Commission intends to continue to process § 203 applications as expeditiously as practicable. As stated in the Policy Statement, the Commission continues to believe that, for most mergers, we can issue an initial order within 150 days of a completed application.

[13] In this preamble, we will not note the sections that do not have proposed revisions. However, these sections are set forth in the attached regulatory text.

[14] Policy Statement at 30,125–26 (we no longer consider the reasonableness of purchase price as a factor and consider it subsumed by the effect on rates factor).

transaction is consistent with the public interest, as set forth in the Policy Statement.

Proposed § 33.2(h)—maps—incorporates the requirements of current Exhibit I and would be applicable only if the proposed transaction involves a disposition of physical facilities.

Proposed § 33.2(I)—other regulatory approvals—incorporates the requirements of current § 33.2(I) and Exhibit G. In addition, copies of relevant orders, if any, obtained by the applicant from other regulatory bodies would be required. However, we are proposing to eliminate a requirement that copies of the applications filed with those bodies be filed with the Commission, as this information largely duplicates the information required in our Part 33 regulations.

Proposed § 33.8—number of copies—includes the information required in the current § 33.6 and also would require that the applicant file electronic as well as paper copies of any competitive screen analysis filed pursuant to proposed §§ 33.3 and 33.4.

Proposed § 33.9—protective orders—would require an applicant to include a proposed protective order if it seeks privileged treatment for any information submitted. The protective order would enable the parties to review any of the data, information, analysis or other documentation relied upon by the applicant to support its application and for which privileged treatment is sought.

C. Proposed Filing Requirements Applicable to Merger Filings

1. Applicability

The following filing requirements apply to merger applicants which are defined as any public utility that either: (a) Would have control of the jurisdictional facilities transferred to another entity, whether the transfer of control is effectuated, directly or indirectly, by merger, consolidation or other means; or (b) would acquire control over facilities of another entity, whether the transfer of control is effectuated, directly or indirectly, by merger, consolidation or other means.[15] We are proposing that for any corporate transaction that results in a direct or indirect merger of public utilities, the applicant must file certain additional information. If the merger transaction involves a horizontal combination of facilities which results in a single corporate entity obtaining ownership or control over generating facilities of unaffiliated parties, the applicant must file the information set forth in § 33.3. If the merger transaction involves a vertical combination of facilities resulting in a single corporate entity obtaining ownership or control over businesses that provide inputs to electric generation and electric generation products that were previously unaffiliated, the applicant must file the information set forth in § 33.4.[16]

2. Effect on Competition

The Commission's competitive concern in any type of merger involving jurisdictional electric utilities is whether the merger will result in higher prices or reduced output in electricity markets. This may occur if the merged firm is able to exercise market power, either alone or in coordination with other firms. Therefore, we are now proposing filing requirements, consistent with Appendix A to our Policy Statement, that will address this concern in a predictable and expedited fashion.

a. Proposed Analytic Requirements. In Appendix A to our Policy Statement, we outlined a standard analytic framework for evaluating mergers as well as a competitive screen analysis and data specifications to allow the Commission to quickly identify proposed mergers that are unlikely to present competitive concerns. Since the Policy Statement was issued, we have gained valuable experience analyzing mergers and are now proposing filing requirements regarding the screen and the data needed for it.

The Commission emphasizes that the screen is not meant to be a definitive test of the competitive effects of a proposed merger. Instead, it is intended to provide a standard, conservative check to allow the Commission and potential applicants to identify mergers that are unlikely to present competitive problems. A standardized screen approach allows applicants, intervenors and the Commission to have a common starting point from which to evaluate proposed mergers. A conservative screen also allows us to quickly approve mergers that pass if they are otherwise consistent with the public interest. Failing the initial screen does not necessarily mean that the Commission will not eventually approve the merger. Rather, it means only that the Commission must take a closer look at the competitive impacts of the proposed merger.

When a proposed merger fails the screen and further evaluation is necessary, the Commission will determine what procedures are appropriate. The Commission recognizes that these procedures, whether trial-type evidentiary hearings or paper hearings, should not delay the processing of mergers unnecessarily and should address the competitive impact of the proposed merger. We solicit comments on alternative procedures for investigating mergers that do not pass the initial screen.[17]

As we propose these filing requirements, the Commission recognizes the tension between the need for providing standardization regarding how proposed mergers will be evaluated and the need for flexibility, given the changing nature of the electric power industry and the likely evolution of analytic techniques and capabilities. The competitive screen analysis that we require provides for standardization. However, applicants are free to provide an alternative analysis, if they believe the additional information would aid the Commission's decision making.[18] The Commission solicits comment on whether the proposed approach strikes the proper balance between standardization and flexibility.

Finally, we recognize that some types of data, or data for some market participants, may not be available to the applicants. Where that is the case, we propose that applicants make their best efforts to provide accurate substitute data.[19] Applicants would have to identify such instances, and explain how specific data deficiencies are addressed and the effect on their analysis. We also encourage applicants to provide corroborating data and to explain how such additional data corroborates the results of the screen analysis. Corroborating information and analysis will provide the Commission with confidence that the results of the

[15] Policy Statement at 30,113. *See also,* Duke Power Company and PanEnergy Corporation, 79 FERC ¶ 61,236 (1997) (*Duke*); Noram Energy Services, Inc., 80 FERC ¶ 61,120 at 61,379 and n.13 (1997)(*NORAM*); Morgan Stanley Capital Group Inc., *et al.,* 79 FERC ¶ 61,109 at 61,503–04 (1997)(*Morgan Stanley*); and Boston Edison Company and BEC Energy, 80 FERC ¶ 61,274 (1997).

[16] We noted in *Enova* that a merger of jurisdictional facilities can be effected by a change in control over a public utility's facilities. Public utilities (or their parent companies) can effect a merger by combining their businesses through the formation of a new holding company that will own or control, either directly or indirectly, previously unaffiliated entities. *See Enova,* 79 FERC ❙ 61,107 at 61,491–96 (1997).

[17] In the Policy Statement, we stated that we would request public comment in this rulemaking on merger processing procedures and how they can be better tailored to meet the specific needs of participants in merger proceedings. Policy Statement at 30,125.

[18] *See* § 33.3(b)(2) of the proposed regulations.

[19] The specific filing requirements are set forth in § 33.3(b)(1) of the proposed regulations.

analysis would not change materially if certain assumptions or input data were changed in reasonable ways.

i. *Data and format.* If circumstances warrant, the Commission must have the ability to perform, within a reasonable time, an independent verification of the screen analysis presented in the application. To do so, we (and intervenors) must have the basic input data in a useful format. Thus, the proposed rule would require that the data needed to complete the competitive screen analysis, and any additional data that are used, be filed electronically.[20] Specific proposed data requirements for the various components of the competitive screen analysis are discussed below.

ii. *Horizontal Screen Analysis.* As noted earlier, the Guidelines set out five steps for merger analysis: Assess (1) whether the merger would significantly increase concentration; (2) whether the merger would result in adverse competitive effects; (3) whether entry would mitigate the adverse effects of the merger; (4) whether the merger would result in efficiency gains not achievable by other means; and (5) whether, absent the merger, either party would likely fail, causing its assets to exit the market.[21]

The competitive screen analysis[22] focuses on the first step: whether the merger would significantly increase concentration. Concentration statistics indicate that a merger may have adverse competitive effects, but they are not the end of the analysis. If the applicants' competitive screen analysis indicates that the merger would significantly increase concentration, the applicants must either address the other steps in the Guidelines or propose measures that would mitigate the adverse competitive effects of the proposed merger.[23] If applicants propose mitigation measures, the screen analysis should also take into account the effect of the remedy on market concentration to the extent possible.

The competitive screen analysis is made up of four steps: (1) Identify the products sold by the merging firms; (2) Identify the customers affected by the merger; (3) identify the suppliers in the market; and (4) analyze the merger's effect on concentration. Below we discuss the proposed filing requirements for each step.

a. Products. Applicants must identify the wholesale electricity products sold by the merging firms. At a minimum, such products would include non-firm energy, short-term capacity (or firm energy) and long-term capacity. Products should be grouped together when they are reasonable substitutes for each other from the buyer's perspective. The supply and demand conditions for particular electricity products may vary substantially over time and, if so, the market analysis should take this into account. Periods with similar supply and demand conditions should be aggregated. Thus, applicants must define and describe all products sold by the firms, explain and support the market conditions and groupings, and provide all data relied upon for product definition. The specific proposed filing requirements are set out in § 33.3(c)(1) of the proposed regulations.

As restructuring in the wholesale and retail electricity markets progresses, short-term markets appear to be growing in importance. The role of long-term capacity markets appears to be diminishing. We seek comments on the assessment of long-term capacity markets in merger analysis.

The delivered price test, which we require applicants use to identify suppliers in a market, addresses the ability of suppliers to deliver energy to relevant markets as measured by their short-term variable costs. However, there is no good measure for long-term capacity prices *per se.* Therefore, we seek comment on the appropriate analytic framework for evaluating long-term capacity products.

b. Geographic markets: Customers (Destination Markets). As discussed in the Policy Statement, identifying the customers likely to be affected by a merger is one part of defining the geographic scope of the relevant market. At this time, we believe that, at a minimum, affected customers would include all entities that are directly interconnected to any of the applicants or that have purchased wholesale electricity from any of the applicants in the past two years. The Commission solicits comment on whether two years is the appropriate period of purchases for deciding to include purchasers as affected customers.[24] Customers considered to be affected by the merger and included in the analysis are referred to as ''destination markets.'' To simplify the analysis, customers that have the same supply alternatives, as identified in the competitive screen analysis, could be aggregated into a single destination market.

Applicants would be required to provide all data used in determining the affected customers. The specific proposed filing requirements associated with identifying affected customers are set out in § 33.3(c)(2) of the proposed regulations.

c. Geographic markets: Suppliers. Defining the relevant geographic market also requires identifying the sellers that can compete to supply a relevant product. Suppliers must be able to reach the destination market both economically and physically.

In some cases, potential suppliers may be parties to mergers that have been announced but not yet consummated. Without presupposition, the Commission seeks comments on whether those suppliers should be treated in the competitive screen analysis as if their merger has been consummated or whether they should be treated as independent rivals.[25]

(1) Delivered Price Test

To determine the suppliers that can economically supply a destination market, applicants must conduct a delivered price test.[26] In the delivered price test, a supplier is considered to be able to economically serve destination markets only to the extent it has generating capacity that can be supplied and delivered to the market at a price, including paying for transmission and ancillary services needed to deliver power to a destination market, that is no more than 5 percent above the pre-merger market price.[27] Applicants must then adjust, if necessary, the capacity of each supplier identified in the delivered price test consistent with the physical transmission capacity available to reach the destination market.

The Commission proposes to require that a supplier's ability to economically serve a destination market be measured by the generating capacity controlled by the supplier rather than historical sales data. Since merger analysis should, to the extent possible, be forward-looking, capacity is a better indicator of future market supply alternatives. Information about current or past sellers may not identify those participants whose generation capacity could discipline

[20] The specific filing requirements are set forth in § 33.8 of the proposed regulations.

[21] Policy Statement at 30,118.

[22] These specific filing requirements are set forth in § 33.3 of the proposed regulations.

[23] The specific filing requirements for applicants addressing other factors and mitigative measures are set forth in § 33.2(g)(4) and § 33.2(g)(3), respectively.

[24] The Policy Statement states that entities in addition to those directly interconnected with applicants would be included if historical transaction data indicate that they recently have been trading partners with any of the applicants. Policy Statement at 30,130.

[25] The specific filing requirements are set out in § 33.3(c)(3) of the proposed regulations.

[26] The specific filing requirements are set forth in § 33.3(c)(3)(i) of the proposed regulations.

[27] Policy Statement at 30,130–31.

future price increases. Moreover, data on sales made in a past environment that was characterized by monopoly and cost-based rates may not be a good indicator of how firms will behave in an environment that is increasingly characterized by generation competition and open access transmission.[28]

In the Policy Statement, we discussed two generating capacity measures that are appropriate for the competitive screen analysis: economic capacity and available economic capacity. We propose that the competitive screen analysis filed by applicants use both measures to gauge supplier presence. The starting point for calculating economic capacity is the supplier's own generation capacity with low enough variable costs that energy from it could be delivered to a market, after paying all necessary transmission and ancillary service costs (including losses), at a price that is 5 percent or less above the pre-merger market price. This capacity must be decreased to reflect the capacity committed to long-term firm sales and increased to reflect the capacity acquired by long-term firm purchases.[29] Capacity that is under the operational control of a party other than the owner should be attributed to the party for whose economic benefit the unit is operated. The resulting amount is the capacity that should be counted as a supplier's economic capacity.

The other measure of supplier presence relevant to the competitive screen analysis is available economic capacity. Available economic capacity is calculated as economic capacity less the capacity needed to serve native load customers.[30] We propose that applicants include this measure in their screen analysis for all suppliers that have native load commitments. This measure presumes that the lowest-cost capacity is used to serve native load and is thus not available to compete in wholesale power markets. However, restructuring in the electricity industry, including regional independent systems operators (ISO) and bid-based power exchanges and retail access, may well affect this presumption. The Commission seeks comments on the role of native load and the weight that the available economic capacity measure should be given, in market analyses.

Applicants may include additional capacity measures, such as total capacity and uncommitted capacity, as they see fit.[31]

Determining which suppliers may economically serve the relevant destination markets requires data regarding generation costs, transmission prices, and transmission limitations. To facilitate the Commission's analysis, these data should be filed electronically and presented in a standard format. Discussed below are the proposed general data requirements that we believe are needed to determine the suppliers in the relevant market for a competitive screen analysis.

Generating capacity and variable cost: The basic determinants of a supplier's presence in a market are the generating capacity that the supplier controls and the variable costs associated with that capacity. For each potential supplier to a relevant market, applicants must file the publicly available generation capability and variable cost data for each generating plant or unit. Aggregate plant level data from plants with units that burn different fuels can result in average plant variable costs that inaccurately state the units' economic ability to sell into a market.[32] For such plants, cost data at the unit level are preferable to cost data at the plant level, and applicants should file disaggregated plant data to the extent it is publicly available. The specific filing requirements for generating unit data are set out in § 33.3(d)(1) of the proposed regulations.

Purchase and sales data adjustments: Data regarding the long-term purchases and sales of suppliers should be filed with the application. These data would, to the extent available, include the buyer, the seller, the contract duration, the degree of interruptibility, the quantity (MW), the capacity and energy charge. Applicants must show the adjustments made to suppliers' capacity due to the long-term contracts. The specific filing requirements for purchase and sales data are set out in § 33.3(d)(2) of the proposed regulations.

Native load commitment adjustments: If applicants use the available economic capacity measure in the competitive screen analysis, they must file historical data regarding hourly native load commitments for the most recent two years, if such data are publicly available.[33] The Commission seeks comment on whether two years is the appropriate period for requiring native load data. The specific filing requirements for reporting native load commitments are set out in § 33.3(d)(3) of the proposed regulations.

Other adjustments to supplier capacity: Other adjustments to reflect a supplier's competitive ability to serve a destination market may be appropriate. Applicants must support any such adjustments with adequate analyses and set out all data and assumptions used. The specific filing requirements are set forth in § 33.3(c)(3)(ii) of the proposed regulations.

There may be instances where a generation supplier's ability to participate in markets is limited by statutory restrictions. For example, the tax-exempt status of municipal generators can be jeopardized if they sell more than a certain percentage of their tax-exempt financed generation to private utilities. Another example is the geographic limitations placed on the Tennessee Valley Authority's wholesale sales activities. Failing to recognize such restrictions could overstate the ability of such generation suppliers to compete and thereby to discipline prices in a market. Applicants must describe any statutory restrictions that may apply to generation suppliers included in their competitive screen analyses.

Another adjustment that may be needed to accurately represent a supplier's ability to sell into markets is reserve requirements for reliability or other reasons. Generation capacity that must be held in reserve is not available to be sold into markets on a firm basis to respond to price increases, and therefore should not be attributed to the supplier in the competitive screen analysis. Applicants must describe reserve requirements and discuss how those requirements affect the availability of each unit included in the competitive analysis.

Finally, we note that one type of adjustment that applicants have proposed is to limit a supplier's

[28] Baltimore Gas & Electric Company and Potomac Electric Power Company, Opinion No. 412, 76 FERC ¶ 61,111 (1996), 79 FERC ¶ 61,027 at 61,120–21 (1997) (*BG&E/PEPCO*). This is not to say, however, that sales data are irrelevant to market analysis. If sales data indicate that certain participants actually have been able to reach the market in the past, it is appropriate to consider whether they are likely candidates to be included in the market in the future. *BG&E/PEPCO* at n.72. It is for this reason that we propose to require a ''trade data check'' as part of the competitive screen analysis.

[29] Long-term firm contracts are those with a remaining commitment of more than one year.

[30] Native Load Customers are defined as the wholesale and retail power customers on whose behalf a utility, by statute, franchise, regulatory requirement, or contract, has an obligation to construct and operate the system to meet the reliable electric needs of such customers.

[31] Uncommitted capacity is total capacity less the capacity needed to serve native load and contractual commitments and to cover reserve margins. In contrast to economic capacity, this measure, as well as total capacity, does not take into account whether the capacity can economically serve a market.

[32] We have noted such inaccuracies in our analysis in a prior case. See *B&GE/PEPCO* at 61,119–120.

[33] Hourly data are available in electronic format from the FERC Form 714, Annual Electric Control and Planning Area Report.

capacity, for purposes of calculating market shares, to the demand of individual destination markets. The Commission found that such an adjustment is not appropriate because it is inconsistent with the Commission's concern with the relative ability of suppliers to dominate a market.[34] We seek comments on this approach.

Transmission prices and loss factors: An important factor in determining whether capacity can serve a destination market is the transmission costs that would be incurred in delivering generation services to a destination market. The Policy Statement recognizes that prices paid for transmission and ancillary services should be added to the variable costs of a supplier's capacity.[35] For purposes of the competitive screen analysis, applicants must use the maximum tariff rates in public utilities' open access tariffs on file with the Commission. Where a non-public utility's transmission system is involved, the maximum tariff rates under its non-jurisdictional (NJ) open access reciprocity tariff would be used. If an NJ tariff for an entity has not been submitted to the Commission, applicants should use their best efforts to obtain or estimate transmission and ancillary services rates.[36] Transmission and ancillary service prices used in a competitive screen analysis, that are not found in publicly-available tariffs or rate schedules, would have to be adequately supported.

Consistent with the conservative nature of the competitive screen analysis, the Commission proposes to require that the transmission prices used be the maximum tariff rates in the open access tariffs. Applicants could present, in addition to the required screen analysis, a separate analysis using lower discounted transmission rates if applicants can demonstrate that discounted lower rates have been generally available and that discounting is likely to be available in the future.[37]

Restructuring efforts in some regions may result in transmission pricing regimes that depart from traditional system-specific, average cost prices. We propose to require that the transmission pricing used in the competitive screen analysis and the data presented in the filing reflect the transmission pricing regime in effect in the relevant geographic markets.

For each transmission system that a supplier must use to deliver energy to a relevant destination market, applicants must provide specific data, including the transmission provider's name, the firm and non-firm point-to-point rates as well as the ancillary services rates, loss factors and an estimate of the cost of supplying energy losses. Where tariff rates that are expressed as $/MW are converted to $/MWH, applicants would have to explain the conversion. Applicants must also explain how suppliers are assigned transmission contract paths to the destination markets. The specific filing requirements for transmission rate and loss factor data are set out in § 33.3(d)(4) of the proposed regulations.

Market price: As discussed in the Policy Statement, a supplier's capacity may be included in a relevant market, for purposes of the competitive screen analysis, if it can be delivered into the market at a price that is no more than 5 percent above the pre-merger market price.[38] We therefore propose that the application present and support market prices for each relevant destination market under various significant market conditions. Significant market conditions include, for example, those characterized by periods of high (peak) or low (off-peak) demand and by transmission constraints.[39]

As discussed in the Policy Statement, the Commission does not believe that all electricity markets have matured sufficiently to exhibit single market-clearing prices for various products. Therefore, applicants may estimate market prices using surrogate measures. The Commission seeks comments on whether there are appropriate criteria for determining when surrogate price measures are needed. We do not propose at this time a specific method for estimating market prices. However, the results must be supported and consistent with what one would expect in a competitive market. For example, we would expect prices to vary little from customer to customer in the same region during similar demand conditions (if there are no transmission constraints), but we would expect prices to vary between peak and off-peak periods.[40] Where results that are at odds with those that would be expected under competitive market conditions are shown, applicants would explain such results. We also encourage applicants to use more than one approach to estimating market prices in order to demonstrate that the market price estimates are valid.

To support the market price estimates, applicants must file any cost or sales data relied upon in estimating the price, as well as an explanation of how the data were used to determine the estimates. The specific filing requirements for market price data are set out in § 33.3(d)(5) of the proposed regulations.

(2) Transmission Capability

The capacity of suppliers that is determined to be economic in a relevant destination market (that is, capacity that can be delivered at a cost that is no more than 5 percent above the pre-merger market price) may be included in a relevant market, for purposes of the competitive screen analysis, only to the extent that transmission capability is available to the supplier. Such capacity is calculated as the sum of available transmission capability (ATC) and any firm transmission rights held by the supplier that are not committed to long-term transactions. Thus, the extent of transmission capability and the allocation of the rights to use that capability are the important factors in determining a supplier's ability to physically reach a market. This section discusses the data and analyses that we propose to require to allow us independently to estimate each economic supplier's ability to reach a market.

Physical capability: For those suppliers determined to be able to economically serve a relevant destination market, applicants must present data on transmission capability for each transmission system a supplier must use to deliver energy to relevant destination markets. To the extent available, these data would include total transfer capability (TTC) and firm ATC, and must be consistent with values posted on the OASIS. We are, however, concerned that the sum of transfer capabilities reported on OASIS sites could exceed the simultaneous transfer capability. We therefore propose that the transmission capability be reported as simultaneous transfer capability to avoid attributing more generating capacity to a market than could actually reach it under actual operating conditions. The Commission understands, however, that simultaneous transfer capability data may not be generally available. Where that is the case, applicants must use the

[34] Ohio Edison Company, *et al.*, 80 FERC ¶ 61,039 at 61,104 (1997) (*FirstEnergy*).

[35] Policy Statement at 30,131.

[36] Non-public utilities that are members of Regional Transmission Groups (RTGs) are required to file transmission tariffs with the RTG. Maximum rates may be found in the RTG tariffs. Such information also may be available on a non-public utility's OASIS.

[37] For public utilities (and non-public utilities with OASIS), evidence should be available from OASIS archives. OASIS database transaction data must be retained and made available upon request for three years after they were first posted. *See* 18 CFR 37.7.

[38] Policy Statement at 30,131.

[39] *Delmarva* at 61,408.

[40] *FirstEnergy*, 80 FERC at 61,105–106.

best data available to avoid overestimating transfer capability. For example, the analysis should not add together the capabilities of several interfaces if the transfer capability into a market is limited by the same facility.[41]

Applicants must also identify the hours when transmission constraints have been binding and the levels at which they were binding. The application would also present data regarding whether and how the proposed merger would change line loadings and the consequent effect on transfer capability. To the extent possible, applicants would provide maps showing the location of transmission facilities where binding constraints currently occur or are expected to occur as a result of the merger. The Commission seeks comment regarding the parameters that determine when a binding constraint is significant enough to cause competitive concern. For example, is there a minimum number of hours that a constraint must last to be of concern?

The Commission understands that applicants must depend on publicly-available information regarding transmission capability for systems other than their own, and that some of the information discussed above may not be generally available for all systems. Applicants should file the best available data regarding systems other than their own. However, all of the data discussed in this section regarding applicants' systems is available to the applicants, and such data must be filed, even if it is not available for all other systems. An accurate representation of transmission conditions on or close to the applicants' systems, where the merger's effects are likely to be greatest, is important. The specific filing requirements for transmission capability data are set out in § 33.3(d)(7) of the proposed regulations.

Firm transmission rights: Transmission capacity along transmission paths between suppliers and destination markets that is reserved under a long-term firm transmission contract by suppliers should be presumed to be available to other suppliers unless the capacity is committed to a long-term power transaction. Applicants must identify such transmission capability and provide supporting information, including the FERC rate schedule numbers if the transmission provider is a public utility. The specific filing requirements for firm transmission rights data are set out in § 33.3(d)(8) of the proposed regulations.

Allocation of transmission capability: Transmission capability that is not subject to existing firm reservations by others may be presumed for purposes of the competitive screen analysis to be available to economic suppliers to reach the relevant markets. However, this would not be the case for transmission capability on interfaces that would become internal to the merged firm after the merger. If, after a merger, the merged firm would have either generating resources or load on both sides of the interface, and would have ownership or entitlement interests in the interface on both sides, the transmission capability on that interface could be used to serve native load. Since native load generally would have a higher reservation priority than most third party uses, it could preclude access by other suppliers to that interface.[42] Consistent with past decisions, the Commission proposes that, for purposes of the competitive screen analysis, it would be inappropriate to allocate to competing sellers unreserved capability over interfaces internal to the merged company unless the applicants demonstrate that: (a) the merged company would not have adequate economic generating capacity to use the interface capability fully, (b) the applicants have committed that the portion of the interface capability allocated to third parties actually will in fact be available to such parties, or (c) alternate suppliers have purchased the transmission capability on a long-term basis.[43] Any allocation of internal transfer capability to third parties consistent with the above guidance must be adequately explained and supported.

In many cases, multiple suppliers could be subject to the same transmission path limitation to reach the same market, and the sum of their economic generation capacity could exceed the transmission capability available to them. Where this situation arises, the competitive screen analysis would have to allocate the transmission capability among the suppliers' generating capacity. There are a number of methods for accomplishing this. Applicants must describe and support the method used and show the resulting transfer capability allocation. The Commission is not proposing a single method at this time, but we invite comments on the merits of various approaches to allocating transmission capability in the competitive screen analysis.

Summary of supplier presence. The Commission proposes to require that applicants provide a table summarizing supplier presence in each of the relevant destination markets. The table would include the market designation, the product, the name of each supplier, and the amount of generation capacity that each supplier can economically deliver to the market after accounting for available transmission capability. The specific filing requirements for this summary of supplier presence are set out in § 33.3(d)(9) of the proposed regulations.

(3) Historical Data

The Commission proposes that applicants file certain historical data that can be used to corroborate the results of the competitive screen analysis. We understand that applicants must depend on publicly-available information for the vast majority of the screen analysis and that some detailed data may not be generally available for all market participants. However, certain important data regarding applicants' transactions and transmission systems are available to the applicants and should be filed.

Trade data. The Commission proposes to require that applicants file actual trade data regarding sales and purchases in which applicants participated for the most recent two years for which data are available. These data will be used to corroborate the suppliers identified as participating in the relevant destination market and the extent of their participation. We would expect some correlation between the results obtained by the competitive screen analysis and recent trade patterns. Applicants must provide an explanation of any significant differences.

We propose to require applicants to file trade data regarding all electricity sales and purchases in which they participated, identifying the seller, the buyer, the characteristics of the product traded and the price. The specific filing requirements for this historical trade data are set out in § 33.3(d)(10).

Transmission service data. The competitive screen analysis evaluates the ability of suppliers to access relevant markets economically and physically. One of its critical components is the availability of transmission capacity. While applicants would be required under the proposed rule to file estimates of ATC and TTC used in the competitive screen analysis, historical transmission service

[41] *FirstEnergy* at 61,104.

[42] Wisconsin Electric Power Company, *et al.* (*Primergy*), 79 FERC ¶ 61,158 at 61,694 (1997), and *FirstEnergy* at 61,107.

[43] *FirstEnergy* at 61,103–04.

information would be valuable to corroborate the results of the analysis that use ATC and TTC estimates. The Commission therefore proposes to require that applicants submit a description of all instances in the two years preceding the application in which transmission service on their systems has been denied, curtailed or interrupted. This description should, to the extent such data are available from OASIS sources, identify the requestor, the type, quantity and duration of service requested, the affected transmission path, the period of time covered by the service requested, the applicants' response, the reasons for the denial and the reservations or other use anticipated by the applicants on the affected transmission path at the time of the request. The specific filing requirements for this transmission service data are set out in § 33.3(d)(11).

d. Concentration Statistics. The final step of the competitive screen analysis is to assess market concentration. Applicants must file pre- and post-merger market concentration statistics calculated in accordance with the preceding sections. Both HHIs and single-firm market share statistics should be presented. The specific filing requirements for concentration statistics are set out in § 33.3(c)(4) of the proposed regulations.

The HHI statistics would be compared with the thresholds given in the Guidelines.[44] If the thresholds are not exceeded, no further analysis need be provided in the application. If an adequately supported screen analysis shows that the merger would not significantly increase concentration, and there are no interventions raising substantial concerns regarding the merger's effect on competition which cannot be resolved on the basis of the written record, the Commission would not look further at the effect of the merger on competition. If, however, the HHI statistics exceed the thresholds, the applicants must either propose mitigation measures that would remedy the merger's potential adverse effects on competition or address the other DOJ merger analysis factors.

e. Mitigation Measures and Analysis of Other Factors. In lieu of addressing the additional factors that would lessen concern regarding the adverse competitive impact of a proposed merger, applicants may propose mitigation measures. Proposals must be specific, and the applicant must demonstrate that proposed measures adequately mitigate any adverse effects of the merger.

Some mitigation measures can be shown to directly lower market concentration. Examples of such measures are generation divestiture and transmission rate reforms (such as the elimination of pancaked rates) that broaden the geographic market. A properly structured ISO or other regional transmission entity can lower concentration by both eliminating the pancaking of rates and encouraging new entrants. Where such measures are proposed, the application must also include, to the extent possible, a separate analysis demonstrating the effect of the proposal on market concentration. Other measures may not be directly linked to decreases in market concentration. Where such other measures are proposed, the application must include an analysis demonstrating how the proposed measure will ensure that the merger will not adversely affect competition in markets where the screen analysis shows a significant adverse effect on concentration. The specific filing requirements concerning mitigation measures are set out in § 33.2(g)(3).

Where the competitive screen analysis indicates concentration results that exceed the thresholds but mitigation measures are not proposed, applicants must provide additional analysis. The Guidelines describe four additional factors to examine in situations where merger-induced concentration exceeds specified thresholds.[45] These factors provide additional information that can be used to determine if a merger raises significant competitive concerns and, if so, if there are countervailing considerations. Based on the Guidelines, the Commission proposes that applicants evaluate the following four factors if the results of the screen analysis show that the concentration thresholds are exceeded: the potential adverse competitive effects of the merger; whether entry by competitors can deter anticompetitive behavior or counteract adverse competitive effects; the effects of efficiencies that could not be realized absent the merger; and whether one or both of the merging firms is failing and absent the merger the failing firm's assets would exit the market.

Applicants' analysis of these additional factors must be consistent with the standards discussed in the Guidelines. For example, the Guidelines require that entry must be timely, likely and sufficient in magnitude to deter or counteract the adverse competitive effects of concern in order to be considered an effective mitigating factor.[46] The Guidelines suggest that entry must occur within two years of the merger to be considered timely, and that all phases of entry must occur within the two-year period, including planning, design, permitting, licensing and other approvals, construction and actual market impact.[47] Given the current lead times for bringing new generation or transmission capacity on line, it may be unlikely that entry can be a mitigating factor unless facilities are already in the planning or construction stages at the time of the application.[48] The specific filing requirements for these additional factors are set out in § 33.2(g)(4) of the proposed regulations.

f. Merger applications that are exempt from filing a competitive screen analysis. There are mergers where the filing of a full-fledged horizontal or vertical screen analysis may not be warranted because it is relatively easy to determine that such merger proposal will not have an adverse impact on competition (*e.g.*, one of the merging parties operates entirely on the East Coast and the other merging party operates entirely on the West Coast). The Commission applied the policy of not always requiring a full competitive screen analysis in its approval of the *Duke/PanEnergy* merger, finding that even though applicants had not performed a complete Appendix A analysis, nevertheless the generating facilities of PanEnergy are so small and are located at such a great distance from Duke Power Company's market that consolidating them is likely to have a negligible effect on market concentration.[49]

Similarly, some mergers that only incidentally involve public utilities would not require a rigorous competitive screen analysis. An example is when major financial firms change their ownership structure in some way and one or both have a power marketing subsidiary. In this case, the principal interest in jurisdictional facilities would be the market-based power sales tariff of the power marketer since it would not own or control any generation.

Therefore, with regard to horizontal mergers, we propose that a merger applicant need not provide the full competitive screen analysis otherwise required under § 33.3 if the applicant

[44] *See* n.11 *supra.*

[45] These factors are those discussed in steps two through five of the DOJ Guidelines.

[46] Guidelines, 57 FR at 41,561.

[47] *Id.* at 41,561–562.

[48] For example, we found in *Primergy* that timely entry would not occur and thus was not a mitigating factor to the anticompetitive effects of the proposed merger. 79 FERC 61,158 at 61,695–696.

[49] *Duke,* 79 FERC at 62,037 (1997).

affirmatively demonstrates that the merging entities do not operate in the same geographic markets or, if they do, the extent of such overlapping operation is de minimis. The Commission seeks comment regarding the appropriate threshold for the de minimis test.

iii. Vertical Screen Analysis. The previous section describes the filing requirements for the analytic framework for evaluating the competitive effects of horizontal mergers, that is, mergers involving two or more jurisdictional electric utilities. However, we noted in the Policy Statement that we intended to apply the same analytic framework to mergers between electric utilities and firms that provide inputs for electricity generation, for example, ''vertical'' mergers.[50] Mergers may have both horizontal and vertical aspects.

Since the Policy Statement was issued, the Commission has acted on seven vertical mergers.[51] In analyzing these cases, the Commission developed a basic approach for assessing whether a vertical merger is likely to adversely affect competition in electricity markets. The framework used by the Commission was informed by the DOJ/FTC approach to evaluating vertical mergers and drew from the analytic framework described in the Policy Statement.

We are now formally proposing an analytic framework and the filing requirements to support that framework to evaluate the competitive effects of vertical mergers. This proposed analytic framework is consistent with the basic approach used by the Commission to evaluate vertical aspects of prior mergers.

The Commission has streamlined this vertical analytic framework and proposes certain abbreviated filing requirements and limitations on the scope of our review.[52] This should greatly reduce the number of applications that will require a complete analysis of the vertical aspects of a proposed merger involving a jurisdictional public utility.

For example, a merger cannot impair competition in ''downstream'' electricity markets if it involves an input supplier (the ''upstream'' merging firm) that sells: (1) a product that is used to produce only a de minimis amount of the relevant product in the downstream geographic market or (2) no product into the downstream electricity geographic market. If such a showing is made, an applicant will not be required to file additional information regarding the vertical aspects of a proposed merger. We believe these proposed abbreviated filing requirements will result in the expeditious processing of mergers that clearly present no vertical competitive concerns.

In cases where more complete information is necessary for the Commission to determine the competitive effects of a vertical merger, we propose an analytic framework comprising four elements: (1) define the relevant products traded by the upstream and downstream merging firms;[53] (2) define the relevant downstream and upstream geographic markets; (3) evaluate competitive conditions using market share and concentration HHI statistics in the downstream and upstream geographic markets; and (4) evaluate the potential adverse effects of the proposed merger in relevant downstream and upstream geographic markets and, if appropriate, other factors that can counteract such effects, including the ease of entry into either the upstream market or the downstream market and merger-related efficiencies.

We propose establishing the same filing requirements for the components of the proposed vertical analytic framework that have counterparts in the horizontal screen analysis, such as defining relevant downstream geographic markets using a delivered price test. Filing requirements for other parts of the vertical analysis, such as defining upstream geographic markets, would be only generally specified. Our proposed analytic framework for analyzing the competitive effects of vertical mergers and associated filing requirements are explained more fully below. We solicit comments on both the reasonableness of the framework and the adequacy of the information required to analyze vertical competitive issues.

a. *Vertical Analytic Framework.* As discussed earlier, the Commission's competitive concern in any merger involving jurisdictional electric utilities is whether the merger will affect competition in electricity markets through higher prices or reduced output. Horizontal mergers can cause this by eliminating a competitor from the market and by the exercise of market power by the merged firm. Vertical mergers do not directly eliminate a competitor from the market but may create or enhance the incentive for the merged firm to adversely affect prices and output in the downstream electricity market.[54] This effect on prices and output can occur in a number of ways, including: (i) foreclosure/raising of rivals' costs; (ii) facilitating coordination; and (iii) evasion of regulation.[55]

Foreclosure/Raising Rivals' Costs: A merger between an entity owning downstream electric generation and an entity owning an upstream input supplier to competitors of that generation may create the incentive for the upstream firm to exclude the merged firm's downstream generation competitors from access to inputs. The upstream merging firm can accomplish this through pricing, marketing and operational actions that would raise the input costs of suppliers competing with the downstream merging firm or by otherwise restricting such suppliers' input supply.[56] This behavior can also deter entry by rival generators in the downstream market.[57]

A vertical merger can create or enhance the ability of the merged firm to adversely affect electricity prices or output in the downstream market by raising rivals' input costs if the upstream and downstream geographic markets are susceptible to the exercise of market power. Under these circumstances in the upstream market, generators purchasing from the upstream merging firm could not turn to alternative suppliers to avoid an increase in input prices. Similarly, customers of the merging downstream firm would not be able to turn to alternative electricity suppliers to avoid an increase in electricity prices. The Commission requests commenters to address the extent to which vertical mergers in the energy industry could result in foreclosure or raising rivals' costs problems.

Facilitating Anticompetitive Coordination: Vertical mergers can also facilitate anticompetitive ''coordination.''[58] A vertical merger can

[50] Policy Statement at 30,113.

[51] *See Enova, LILCO, NORAM, Duke/PanEnergy,* PG&E Corporation and Valero Energy Corporation, 80 FERC ¶ 61,041 (1997) (*PG&E/Valero*); Destec Energy, Inc. and NGC Corporation, 79 FERC, ¶ 61,373 (1997) (*Destec/NGC*); Enron Corporation, 78 FERC, ¶ 61,179 (1997) (*Enron*).

[52] These specific filing requirements are set forth in § 33.4 of the proposed regulations.

[53] There may be several relevant upstream input products (such as fuel transportation and turbine manufacturers).

[54] Horizontal mergers may give rise to a higher market share for the merged entity and increase concentration in the market. Market share and concentration are not directly affected by a solely vertical merger.

[55] *See Enova,* 79 FERC ¶ 61,372 at 62,560.

[56] Foreclosure can also result from a vertical merger if the downstream merging firm refuses to purchase from input suppliers other than its upstream affiliate.

[57] *See Enova,* 79 FERC ¶ 61,372 at 62,560.

[58] Anticompetitive coordination refers generally to the exercise of market power through the concurrence of other (non-merging) firms in the market or on coordinated responses by those firms.

Continued

facilitate anticompetitive coordination in either the upstream or downstream markets if, in either case, the merger: (1) Creates or enhances the ability of competing firms to agree to raise prices or restrict output or (2) dampens the incentive for firms to compete aggressively on price or service. Whether anticompetitive coordination results in higher electricity prices or lower output depends on the competitive conditions in the upstream and downstream geographic markets. In addition, anticompetitive coordination can be increased if information, useful for coordinated behavior and not available elsewhere, must be shared between the upstream firm and its customers, and there are substantial transactions between the upstream merging firm and non-affiliated customers.[59]

The Commission is aware that the potential mechanisms through which a vertical merger could facilitate anticompetitive coordination and the conditions under which such coordination would result in competitive harm are complex and subject to some debate. In a later section, we solicit general comment on anticompetitive coordination and how, or if, it should be addressed in an analytic framework.

Regulatory Evasion: We solicit comment on the potential for vertical mergers involving jurisdictional electric utilities to result in regulatory evasion. For example, after merging with an upstream input supplier, a downstream electric utility's input purchases would be ''internal'' to the firm. The merger, therefore, may create the incentive for the merging upstream input supplier to inflate the transfer prices of inputs sold to the downstream regulated utility to the extent it can evade regulatory scrutiny. Profits would increase for the vertically-integrated firm as a result of such a strategy but would accrue to the unregulated affiliate. Higher electricity prices could result from such a strategy.

The Commission notes that regulatory evasion is a behavior that potentially affects retail electricity prices.[60] Consistent with our position taken in the Merger Policy Statement, the Commission does not propose to address regulatory evasion concerns that affect retail electricity prices unless specifically asked to do so by a state regulatory authority.[61]

We also solicit comment on our proposed treatment of mergers in which regulatory evasion may be a concern, and how ongoing changes in the industry, such as ISO development and retail access, might affect our proposed approach.

b. Products supplied by the upstream merging firm are used to produce a de minimis amount of the relevant downstream products. As discussed earlier, the Commission is proposing certain instances under which only minimal information and analysis would be necessary to confirm that a vertical merger poses no competitive concern. One such instance is when the upstream merging firm sells a product that is used to produce only a de minimis amount of the relevant product in the downstream geographic market.

The Commission expects that vertical consolidations that fall into this category will be relatively easy to identify. We therefore propose that applicants would need to supply only minimal information to make an affirmative showing that a vertical merger does not require further analysis in order to determine if it would have an adverse effect on competition in downstream electricity markets.

If the products sold by the upstream merging firm are used to produce a de minimis amount of the relevant products in the downstream geographic market, a vertical merger should pose no competitive concern.[62] An example is when the upstream merging firm supplies gas transportation but almost all of the energy in the downstream market is produced from coal-fired generating capacity.

The Commission proposes that applicants desiring to make such a showing would have to: identify products sold by the upstream and downstream merging firms and identify the suppliers (by type of generation, *e.g.*, gas-fired, coal-fired, that could compete with the downstream merging firm in providing downstream products. The second part of this analysis, that is, identifying the downstream suppliers, is necessary to determine whether customers affected by the merger could potentially turn to alternative suppliers in the event of a post-merger price increase. The Commission proposes that applicants may provide an approximate definition of the downstream geographic market. At this time, we will not propose thresholds for the proportion of output in the downstream geographic market that is accounted for by the inputs sold by the upstream merging firm or other ''bright line'' tests for such de minimis determinations.

c. The upstream merging firm does not sell products in the geographic market in which the downstream merging firm resides. A vertical merger involving an upstream firm that does not sell into the downstream geographic market would not affect competition in that market. Such a merger would involve an electric utility in a different geographic market from that served by the upstream firm and would raise no competitive concerns.

The Commission proposes that applicants desiring to make such a showing would have to identify: (1) Products sold by the upstream and downstream merging firms; and (2) downstream suppliers who purchase inputs from the upstream merging firm and determine if those customers compete with the downstream merging firm to supply downstream products. The second part of this analysis, that is, identifying the downstream suppliers, is necessary to determine whether customers affected by the merger could potentially turn to alternative suppliers in the event of a post-merger price increase. The Commission proposes that applicants could provide an approximate definition of the downstream geographic market.

For both of these abbreviated showings, applicants should explain, justify and document their analyses and provide all supporting data and documentation. The abbreviated filing requirements are set forth in § 33.2(g)(2)(ii) of the proposed regulations. We solicit comments: on the reasonableness and efficacy of the proposed abbreviated filing requirements provisions; approaches to approximating the downstream geographic market; and appropriate de minimis thresholds for the amount of downstream output produced by inputs sold by the upstream merging firm.

d. Components of the Analytic Framework. Described in more detail below are the components of the proposed analytic framework for vertical mergers.

See supra n.9. We emphasize that in the electric utility industry, the terms ''coordination'' or ''coordinating activities'' apply in a specific context. For example, coordinating with other firms in downstream electricity markets in the creation of independent system operators would not raise competitive concerns. The Commission has also long encouraged technical coordination in order to promote reliability.

[59] There are many examples of potential anticompetitive coordination. One possibility is if the downstream merging firm obtains price quotes and other sensitive competitive information from other (non-merging) upstream suppliers and transfers it to its upstream merging partner. The exchange of such information among upstream input suppliers can be potentially useful in agreeing to raise prices or restrict output to all downstream customers.

[60] Regulatory evasion could affect requirements service customers in wholesale electricity markets. However, we believe this is less likely to be a concern if wholesale markets are competitive.

[61] Policy Statement at 30,128.

[62] *See, Duke/PanEnergy*, 79 FERC, ¶ 61,236 at 62,039.

1. Relevant Products

a. Downstream Market

Applicants must identify and define the relevant products sold in the downstream electricity market affected by the business activity of the upstream merging firm. The proposed requirement for this aspect of the vertical analytic framework is the same as that proposed for the horizontal screen analysis, as set forth in § 33.3(c)(1) of the proposed regulations. We seek comments on how, if at all, our proposed approach for defining relevant products in the downstream market should differ from that required for horizontal mergers. We also seek comments on any alternative approaches.

b. Upstream Market

Applicants must identify the products produced by the upstream merging firm and used by the downstream merging firm and/or its competitors in the production of relevant downstream electricity products. Relevant upstream products could be grouped together when they are good substitutes for each other from the buyer's perspective. Also, the supply and demand conditions might vary over time, creating discrete, time-differentiated products.

Accordingly, the relevant products identified by the applicant should be fully explained, justified and documented. The specific filing requirements for identifying and defining relevant upstream products are set out in § 33.4(c)(1)(ii) of the proposed regulations. The Commission seeks comments on the proposed approach and any alternative approaches to defining relevant input products, and how such approaches should vary for different types of inputs.

2. Relevant Geographic Markets

a. Downstream Market

Defining the downstream geographic market consists of identifying the customers potentially affected by the merger and the suppliers that can compete with the merging firm to supply a relevant electricity product. In the proposed regulations for the horizontal screen analysis, relevant geographic electricity markets are defined using the delivered price test. Under the delivered price test, a supplier would be considered in the market if it has generating capacity from which energy can be made available and delivered to the market at a price, including transmission and ancillary services, no more than five percent above the market price.

The Commission proposes that the relevant downstream geographic market in a vertical merger would be defined similarly, as set out in § 33.3(c)(3) of the proposed regulations for the horizontal analytic framework. However, we seek comment on the appropriateness of a delivered price test analysis for analyzing downstream markets in vertical mergers. We also solicit comments on any alternative approaches to defining downstream geographic markets in a vertical merger context.

b. Upstream market

The Commission will not at this time propose precise filing requirements for defining upstream geographic markets. One reason is that the Commission has not yet acted upon an application for a merger with vertical aspects that required a rigorous definition of the upstream geographic market. Another reason is that the types of analysis and data needed to define geographic upstream markets may vary from input to input. The Commission expects to better understand the data and analysis needed to define geographic input markets—if such analysis proves necessary—as we evaluate proposed vertical mergers.

Until such time, the Commission is proposing that applicants would approximate the upstream geographic market for each relevant upstream product and submit data and documentation necessary to support their analysis. Such approximate definitions of the upstream geographic market could be based, perhaps, on historical trade data. Applicants should define the smallest reasonable geographic markets.

Applicants should fully explain, justify and document their analysis, including all supporting data and documentation. The filing requirements for this aspect of the analytic framework are set forth in § 33.4(c)(2) of the proposed regulations. We seek comment on appropriate approaches to defining upstream geographic markets in vertical mergers.

3. Evaluating Competitive Conditions in Geographic Markets

a. Downstream Market

Once the downstream geographic market has been defined, applicants would assess competitive conditions in the downstream market. To do so, applicants would calculate market shares for the suppliers identified in the delivered price test and downstream market concentration using the HHI statistic.

The Commission proposes that for a vertical merger, downstream market share statistics reflect the ability of buyers in the downstream market to switch—in response to a price increase—from generation served by the upstream merging firm. Specifically, we propose that applicants would identify the upstream suppliers who sell or deliver inputs to each generating unit or plant in the downstream geographic market. All generation capacity served by the same input supplier would be considered together and therefore be given a market share, *i.e.*, treated as if it was owned or controlled by a single firm.[63]

The Commission proposes that applicants calculate downstream market concentration using the HHI statistic. While the Commission has not explicitly reported HHI statistics for relevant geographic markets in prior vertical merger cases, the HHI statistic is, along with market share, a generally accepted indicator of competitive conditions in a relevant market.[64] As a general matter, therefore, the Commission proposes that markets that are ''highly concentrated'' under the Guidelines standard (*i.e.*, an HHI of 1800 or above) are considered to be conducive to the exercise of market power and therefore should warrant additional analysis.[65]

The specific filing requirements for assessing the competitive conditions in the downstream market are set forth in § 33.4(c)(3)(i) of the proposed regulations. We solicit comments on this approach to assessing market shares and concentration in the downstream market, and any alternative approaches.

b. Upstream Market

The Commission proposes that Applicants would assess competitive conditions in the upstream market by calculating market shares for each supplier identified in the delivered price test and market concentration using the HHI statistic. The Commission proposes that upstream geographic markets that are ''highly concentrated''

[63] *See Enova*, 79 FERC ¶ 61,372 at 62,562. If multiple upstream suppliers serve a single generating plant or unit, applicant's analysis would take this into account.

[64] The DOJ 1984 Merger Guidelines address vertical mergers and discuss both market share and HHI statistics. *See* DOJ 1984 Merger Guidelines at 46.

[65] The DOJ 1984 Merger Guidelines use as a threshold for further investigating the competitive effect of a vertical merger a ''highly concentrated'' market. *See* DOJ 1984 Merger Guidelines at 46. Because concentration thresholds are indicators of cases in which additional investigation into the possibility of competitive harm might be warranted, the Commission would look further at mergers with an HHI near 1800 or above.

under the Guidelines standard (*i.e.*, an HHI of 1800 or above) are considered to be conducive to the exercise of market power and therefore should warrant additional analysis.

The specific filing requirements for assessing the competitive conditions in the upstream market are set forth in § 33.4(c)(3)(ii) of the proposed requirements. We solicit comments on this approach to assessing market shares and concentration in the upstream market, and any alternative approaches.

4. Mitigation Measures and Analysis of Other Factors

Where applicants' analysis indicates concentration results that raise concerns regarding the competitive effect of the merger, the Commission proposes that applicants would evaluate additional factors that could provide insight into whether a proposed merger would be likely to harm competition in electricity markets. Applicants need evaluate these factors only if competitive conditions in the upstream and downstream markets support the possibility that the merger could raise rivals' costs or facilitate coordination, as described in the following sections. In lieu of addressing the additional factors that would lessen concern regarding the adverse competitive impact of a proposed merger, applicants may propose mitigation measures. Proposals must be specific, and the applicant must demonstrate that proposed measures adequately mitigate any adverse effects of the merger.

If applicants choose not to propose mitigation, the factors that we propose applicants evaluate in this stage of the analytic framework are those set out in Sections 2 through 5 of the Guidelines: potential adverse competitive effects, ease of entry, merger-related efficiencies, and whether one of the merging firm's assets would exit the market, but for the merger. The second, third and fourth of these factors (entry, merger-related efficiencies and a failing firm rationale) can counteract any potential competitive harm indicated by market share and concentration statistics. Regarding entry, the Commission seeks comments on the circumstances under which entry into either the upstream or downstream markets would be sufficient to mitigate the potential competitive harm of a proposed merger and the circumstances under which entry into both markets would be necessary.[66] The first of these factors looks more specifically at the circumstances under which potential adverse competitive effects would materialize. Below, we discuss the proposed requirements for evaluating such circumstances for mergers posing foreclosure/raising rivals' costs and anticompetitive coordination concerns.

a. Foreclosure/Raising Rivals' Costs

If both the upstream and downstream markets are conducive to the exercise of market power, there is the potential for the merger to harm competition in the downstream geographic market by raising the input costs of rival downstream suppliers. As such, we propose that applicants demonstrate that raising rivals' costs would be difficult, even if the merger creates or enhances the ability of the merged firm to adversely affect prices or output in the downstream market.

For example, we propose that applicants provide adequate information, supported by data and documentation, regarding how the merged firm could raise its rivals' costs. We propose that such information could include, but is not limited to: (1) Types of products or services sold by the upstream firm to each downstream competitor; (2) terms of contracts under which products or services are sold and the duration of such contracts; (3) a description of the prices, availability quality and input delivery points of inputs sold to downstream competitors; and (4) information on generation unit scheduling, impending technological improvements, and marketing that is provided by customers to the upstream firm, particularly any market-sensitive information that may be subject to confidentiality provisions.[67] We seek comment on how such data can be made available to intervenors under protective order procedures.

We also propose that applicants would evaluate whether customers of the upstream input supplier can readily switch to alternative inputs to avoid a price increase by the upstream merging firm. If switching to alternative inputs is possible, the merger may not create or enhance the ability of the merging firm to affect output and prices in the upstream market.

We propose that applicants would have to provide data and documentation supporting how regulatory requirements governing the conduct of upstream input suppliers (such as open-access provisions applicable to gas pipelines under Order No. 636)[68] could counteract any competitive harm posed by a merger.

Finally, a raising rivals' costs strategy is unlikely to harm competition unless such behavior is profitable. Therefore, we propose that applicants would provide data and documentation supporting an assessment of the profitability of a raising rivals' costs strategy if this data could materially affect a conclusion that a proposed merger could harm competition.

The filing requirements for this aspect of the analytic framework are set forth in § 33.2(g)(4) of the proposed regulations. The Commission seeks comment on the foregoing, and other pertinent considerations that may materially affect a finding that a proposed vertical merger would be likely to impair competition in electricity markets and how such considerations should be analyzed.

b. Facilitating Anticompetitive Coordination

There is a possibility that a vertical merger could harm competition in the downstream market by facilitating anticompetitive coordination in either the upstream or downstream market. As discussed earlier, whether anticompetitive coordination results in higher electricity prices or lower output depends on the competitive conditions in the upstream and downstream geographic markets. However, since we have not described the ways in which a vertical merger could facilitate coordination, it would be premature to specify the market conditions under which increased coordination would warrant applicants proceeding to evaluate additional factors.

Therefore, we solicit comments on how a vertical merger could facilitate anticompetitive coordination; the conditions under which such coordination would impair competition in electricity markets; and the significance of coordination problems as they relate to the industries likely to be affected by the vertical mergers in which the Commission would take an interest.

5. Remedy

In the event a vertical merger poses competitive concerns after accounting

[66] *See* DOJ 1984 Merger Guidelines §§ 4.211 and 4.212.

[67] *See*, Vastar Resources, Inc., *et al.*, 81 FERC ¶ 61,135 at 61,633.

[68] *See* Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, and Regulation of Natural Gas After Partial Wellhead Decontrol, Order No. 636, FERC Stats. and Regs. ¶ 30,939 (April 8, 1992), *order on reh'g*, Order No. 636–A, FERC Stats. & Regs. ¶ 30,950 (August 2, 1992), *order on reh'g*, Order No. 636–B, 61 FERC ¶ 61,272 (November 27, 1992), *reh'g denied*, Order No. 636–C, 62 FERC ¶ 61,007 (January 8, 1993), *order aff'd in part and remanded in part*, United Distribution Companies, v. FERC, 88 F.3d 1105 (D.C. Cir. 1996); *order on remand*, Order No. 636–C, 78 FERC ¶ 61,186 (1997); *rehearing pending.*

for the additional factors described in the previous section, the Commission proposes that the merger may be made acceptable if certain remedial actions are taken. For example, in *Enova* the Commission specified certain remedies that would address the competitive concerns presented by that merger. The remedies included a code of conduct, restrictions on affiliate transactions and an electronic gas reservation and information system.[69] We solicit comments on the types of remedial action that would effectively address such competitive concerns.

3. Effect on Rates—Proposed Requirements for Ratepayer Protections

The Commission has previously determined that ratepayer protection mechanisms are necessary to protect the wholesale customers of merger applicants (*e.g.*, open seasons to allow early termination of existing service contracts or rate freezes) if the contemplated benefits of the merger do not materialize. If the proposed merger raises substantial issues of fact with regard to its impact on rates, the Commission has stated that it will consider further investigation of the matter or set it for hearing.[70] Therefore, all merger applicants would be required to demonstrate how wholesale ratepayers will be protected, and applicants would have the burden of proving that their proposed ratepayer protections are adequate. Specifically, each proposed ratepayer protection mechanism would clearly identify what customer groups are covered (*e.g.*, requirements customers, transmission customers, formula rate customers), what types of costs are covered, and the time period for which the protection will apply. This information should be included in the applicants' explanation of the effect of the transaction on rates required in § 33.2(g)(i) of the proposed regulations.

4. Effect on Regulation—Proposed Requirements Concerning the Impact on State and Commission Regulatory Jurisdiction

The Commission has previously stated that, in merger filings involving public utility subsidiaries of registered holding companies, applicants must either commit to abide by the Commission's policies with respect to intra-system transactions within the holding company structure or be prepared to go to hearing on the issue of the effect of the proposed registered holding company structure on effective regulation by the Commission.[71] Consistent with this policy, we propose that, for all merger applications involving public utility subsidiaries of registered holding companies, applicants include such a commitment.

Since regulatory evasion can also result, for example, from passing higher input prices through to the retail customers of a regulated affiliate, we further propose that merger applicants, in all cases, state whether the affected state commissions have authority to act on the proposed merger. Where the affected state commissions have such authority, the Commission would not set for further investigation or hearing the matter of whether the transaction will impair effective regulation by the affected state commissions. However, if the affected state lacks authority over the merger and raises concerns about the effect on regulation, we will consider, on a case-by-case basis, whether to set this issue for hearing.[72] This information should be included in the applicants' explanation of the effect of the transaction on regulation required in § 33.2(g)(1) of the proposed regulations.

D. Emerging Issues

1. Computer Modeling

The use of computer models—specifically, computer programs used to simulate the electric power market—has been raised in comments on the Policy Statement and also in specific cases. In comments on the Policy Statement, DOJ recommended using computer simulations to delineate markets and also noted that these simulations could be helpful in gauging the market power of the merged firm.[73] The Commission believes that use of a properly structured computer model could account for important physical and economic effects in an analysis of mergers and may be a valuable tool to use in a horizontal screen analysis. For example, a computer model might prove particularly useful in identifying the suppliers in the geographic market that are capable of competing with the merged company. It could provide a framework to help ensure consistency in the treatment of the data used in identifying suppliers in a geographic market.

Therefore, we are issuing a notice of request for written comments and intent to convene a technical conference concurrently with this NOPR. This notice requests comments on the use of computer models in merger analysis and intends to convene a public conference to discuss this matter. As more fully explained in the notice, the purpose of this inquiry is to gain further input and insight into whether and how computer models can be useful to our competitive screen analysis set forth in Appendix A of the Policy Statement.

2. Other Emerging Issues

The 1996 Policy Statement primarily addresses horizontal mergers, but shortly after it was adopted a number of vertical electric-gas mergers were filed with the Commission. For this reason, we request comments now on whether we should expect other new types of corporate groupings involving public utilities to emerge, what form they might take, and how we should analyze the competitive effects if such combinations are in fact presented. We seek comments on new kinds of mergers that may lead to the blurring of traditional utility services and other business lines. Should our market concentration analysis extend to new products that may result from such a convergence of business lines, even if these products are principally concerned with end-use markets? For example, a combination involving a public utility and a telecommunication business could offer new products and services, such as sophisticated interactive electric metering, real-time pricing, automatic utility control of customer machinery and appliances to minimize electricity costs, and computerized shopping for the most economical power supplier. Are our proposed vertical merger filing requirements adequate for review of this form of public utility merger, to the extent such mergers are jurisdictional?

We also request comment on how the structural changes occurring in the electric industry should be considered in our analysis of the effect that public utility mergers may have on competition. For example, the Commission is aware that as retail markets evolve into regional power markets, it may become more difficult for individual states to adequately examine a merger's impact on such

[69] *Enova*, 79 FERC ¶ 61,372 at 62,565 (1997).

[70] Policy Statement at 30,111, 30,121–24, and n.5. *See also*, *Morgan Stanley*, 79 FERC at 61,504–05; *Duke/PanEnergy*, 79 FERC at 62,039–41; *Enova*, 79 FERC at 62,566; *Destec*, 79 FERC at 62,574–75; *LILCO*, 80 FERC at 61,079–80; *FirstEnergy*, 80 FERC at 61,098; *NORAM*, 80 FERC at 61,382–8–12.

[71] Policy Statement at 30,112 and 30,124–25. *See also*, *Duke/PanEnergy*, 79 FERC at 61,041–42; *Morgan Stanley*, 79 FERC at 61,505; *Enova*, 79 FERC at 62,566–67; *Destec*, 79 FERC at 62,575; *LILCO*, 80 FERC at 61,080; *FirstEnergy*, 80 FERC at 61,098–99; *NORAM*, 80 FERC at 61,383; and *Delmarva*, 80 FERC at 61,412–13 and n.60.

[72] Policy Statement at 30,125.

[73] Appendix to DOJ Merger NOI Comments at A–11, n12.

regional markets.[74] We seek comment on whether it is feasible to address competition only at the wholesale level and ignore changes in the market that arise in the context of state retail choice programs and transform retail franchise service territories into multistate supplier markets. Where merger applicants are members of a multistate ISO or regional power exchange, should we modify our analysis and criteria and, if so, how?

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[75] requires that rulemakings contain either a description and analysis of the effect the proposed rule will have on small entities, or a certification that the rule will not have a substantial economic effect on a substantial number of small entities. The entities that would be required to comply with the proposed rule are public utilities disposing of jurisdictional facilities, merging such facilities with such facilities owned by another person, or acquiring the securities of another public utility. These entities do not fall within the RFA's definition of small entities.[76] Thus, the Commission certifies that this rule will not have a ''significant economic impact on a substantial number of small entities.''

V. Environmental Statement

The Commission concludes that promulgating the proposed rule would not represent a major federal action having a significant adverse impact on the human environment under the Commission's regulations implementing the National Environment Policy Act.[77] The proposed rule falls within the categorical exemption provided in the Commission's regulations for approval of actions under §§ 4(b), 203, 204, 301, 304, and 305 of the Federal Power Act relating to issuance and purchase of securities, acquisition or disposition of property, merger, interlocking directorates, jurisdictional determinations and accounting.[78] Consequently, neither an environmental assessment nor an environmental impact statement is required.

VI. Information Collection Statement

The following collection of information contained in this proposed rule has been submitted to the Office of Management and Budget for review under § 3507(d) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d). Comments are solicited on the Commission's need for this information, whether the information will have practical utility, the accuracy of the provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques.

Estimated Annual Burden:

Data collection	Number of respondents	Number of responses	Hours per response	Total annual hours
FERC–519	100	1	80	8,000

Total Annual Hours for Collection:

(Reporting + Recordkeeping, (if appropriate)) = *8,000*

Although most of the discussion in this document focuses mainly on the Commission's merger policy, the NOPR does address the filing requirements for all data filed under the FERC–519 form. This data collection is relevant to a small number of mergers as well as numerous less complex corporate applications. The hours per response is a weighted average time estimate based on the projected number of merger filings and other corporate applications.

Information Collection costs: The Commission seeks comments on the costs to comply with these requirements. It has projected the average annualized cost per respondent to be the following:

ANNUALIZED CAPITAL/STARTUP COSTS

Annualized Costs (Operations & Maintenance)	$4,210.31
Total Annualized Costs	4,210.31

The Office of Management and Budget's (OMB) regulations,[79] require OMB to approve certain information collection requirements imposed by agency rule. The Commission is submitting notification of this proposed rule to OMB.

Title: FERC–519, Disposition of Facilities, Mergers and Acquisition of Securities.

Action: Proposed collection.

OMB Control No.: 1902–0082.

Respondents: Business or other for profit, including small business.

Frequency of Responses: On occasion.

Necessity of the information: The proposed rule revises the requirements contained in 18 CFR Part 33 which implements § 203 of the FPA. This proposed rule revises 18 CFR Part 33 by providing applicants with more detailed guidance for preparing applications and is consistent with the policies set forth in the Policy Statement. The proposed rule is intended to lessen regulatory burdens on the industry by eliminating outdated and unnecessary filing requirements, clarifying existing requirements, and streamlining the filing requirements for mergers that do not raise competitive concerns.

The implementation of these proposed filing requirements will help the Commission carry out its responsibilities under the FPA in accordance with the objectives of the Commission's Open Access Rule[80] and in consideration of the changing market structures in the electric industry. The Commission will use the data received as a result of the proposed filing requirements: (1) In the review of the proposed merger of jurisdictional facilities to ascertain whether the merger is in the public interest; (2) for general industry oversight; and (3) to expedite the corporate application review process.

Internal Review: The Commission has reviewed the requirements pertaining to the merger of jurisdictional facilities of public utilities and determined that the proposed revisions are necessary because of continuing changes in the electric power industry. Requiring such filing information, as set forth in this NOPR, would assist the Commission in

[74] *See, Atlantic City/Delmarva,* 81 FERC 61,173 at 61,755 (1997).

[75] 5 U.S.C. 601–612.

[76] 5 U.S.C. 601(3) (citing § 3 of the Small Business Act, 15 U.S.C. 632). Section 3 of the Small Business Act defines a ''small-business concern'' as a business which is independently owned and operated and which is not dominant in its field of operation. 15 U.S.C. 632(a).

[77] 18 CFR Part 380.

[78] 18 CFR 380.4(a)(16).

[79] 5 CFR 1320.11 (1996).

[80] *See* Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g,* Order 888–A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g,* Order 888–B, 81 FERC ¶ 61,248 (1997).

determining whether proposed mergers are consistent with the competitive goals of the FPA, the Energy Policy Act of 1992[81] and the Commission's Open Access Rule. These requirements conform to the Commission's plan for efficient information collection, communication, and management within the electric power industry. The Commission has assured itself, by means of its internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, [Attention: Michael Miller, Division of Information Services, Phone: (202) 208–1415, fax: (202) 273–0873, email:michael.miller@ferc.fed.us].

For submitting comments concerning the collection of information(s) and the associated burden estimate(s), please send your comments to the contact listed above and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, D.C. 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission, phone: (202) 395–3087, fax: (202) 395–7285].

VII. Public Comment Procedures

The Commission invites comments on the proposed rule from interested persons. An original and 14 copies of written comments on the proposed rule must be filed with the Commission no later than August 24, 1998.

In addition, commenters are requested to submit a copy of their comments on a 3½ inch diskette formatted for MS–DOS based computers. In light of our ability to translate MS–DOS based materials, the text need only be submitted in the format and version that it was generated (*i.e.*, MS Word, WordPerfect, ASCII, etc.). It is not necessary to reformat word processor generated text to ASCII. For Macintosh users, it would be helpful to save the documents in Macintosh word processor format and then write them to files on a diskette formatted for MS–DOS machines. All comments should be submitted to the Office of the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, and should refer to Docket No. RM98–4–000.

All written comments will be placed in the Commission's public files and will be available for inspection in the Commission's public reference room at 888 First Street, NE, Washington, DC, 20426, during business hours.

[81] Energy Policy Act of 1992, Pub. L. No. 102–486, 106 Stat. 2776, 2905 (1992).

List of Subjects in 18 CFR Part 33

Electric utilities, Reporting and recordkeeping requirements, Securities.

By the Commission.

Linwood A. Watson, Jr.,

Acting Secretary.

In consideration of the foregoing, the Commission proposes to revise Part 33, Chapter I, Title 18 of the *Code of Federal Regulations*, as set forth below.

PART 33—APPLICATION FOR ACQUISITION, SALE, LEASE, OR OTHER DISPOSITION, MERGER OR CONSOLIDATION OF FACILITIES, OR FOR PURCHASE OR ACQUISITION OF SECURITIES OF A PUBLIC UTILITY

Sec.
33.1 Applicability.
33.2 Contents of application—general information requirements.
33.3 Additional information requirements for applications resulting in a single corporate entity obtaining ownership or control over generating facilities of unaffiliated parties.
33.4 Additional information requirements for applications resulting in a single corporate entity obtaining ownership or control over businesses that provide inputs to electric generation and electric generation products that were previously unaffiliated.
33.5 Proposed accounting entries.
33.6 Form of notice.
33.7 Verification.
33.8 Number of copies.
33.9 Protective order.
33.10 Additional information requests by the Commission.

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

§ 33.1 Applicability.

The requirements of this part will apply to public utilities seeking authority for any transaction requiring Commission authorization under section 203 of the Federal Power Act.

§ 33.2 Contents of application—general information requirements.

Each applicant shall include in its application, in the manner and form and in the order indicated, the following general information with respect to such applicant and each entity whose jurisdictional facilities or securities are involved:

(a) The exact name of the applicant and its principal business address.

(b) The name and address of the person authorized to receive notices and communications regarding the application, including phone and fax numbers, and E-mail address.

(c) A description of the applicant, including:

(1) All business activities of the applicant, including authorizations by charter or regulatory approval, even if not currently engaged in such activity;

(2) Organizational charts depicting the applicant's current and proposed post-transaction corporate structures (including any pending authorized but not implemented changes) indicating all parent companies, subsidiaries, affiliates and associate companies, unless the applicant demonstrates that the proposed transaction does not affect the corporate structure of any party to the transaction;

(3) A description of all joint ventures, strategic alliances, or other business arrangements to which the applicant or its parent companies, subsidiaries, affiliates and associate companies is a party, unless the applicant demonstrates that the proposed transaction does not affect any of its business interests;

(4) The identity of common officers or directors of parties to the proposed transaction;

(5) A description of any authorizations, licenses, or other approvals received from the Commission; and

(6) A description and location of wholesale power sales customers and unbundled transmission services customers served by the applicant or its parent companies, subsidiaries, affiliates and associate companies.

(d) A description of jurisdictional facilities owned, operated, or controlled by the applicant or its parent companies, subsidiaries, affiliates, and associate companies.

(e) A narrative description of the proposed transaction for which Commission authorization is requested, including:

(1) The identity of all parties involved in the transaction;

(2) All jurisdictional facilities and securities associated with or affected by the transaction;

(3) The consideration for the transaction; and

(4) The effect of the transaction on such jurisdictional facilities and securities.

(f) All contracts related to the proposed transaction together with copies of all other written instruments entered into or proposed to be entered into by the parties to the transaction.

(g) A statement explaining the facts relied upon to demonstrate that the proposed transaction is consistent with the public interest. The applicant must

include a general explanation of the effect of the transaction on:

(1) Competition;

(2) Rates; and

(3) Regulation of the applicant by the Commission and state commissions with jurisdiction over any party to the transaction. The applicant should also file any other information it believes relevant to the Commission's consideration of the transaction.

(h) If the proposed transaction involves physical property of any party, the applicant must provide a general or key map showing in different colors the properties of each party to the transaction.

(i) If the applicant is required to obtain licenses, orders, or other approvals from other regulatory bodies in connection with the proposed transaction, the applicant must identify the regulatory bodies and indicate the status of other regulatory actions, and provide a copy of each order of those regulatory bodies that relates to the proposed transaction.

§ 33.3 Additional information requirements for applications resulting in a single corporate entity obtaining ownership or control over generating facilities of unaffiliated parties.

(a) If, as a result of the proposed transaction, a single corporate entity obtains ownership or control over the generating facilities of two or more of the previously unaffiliated parties to the transaction or their parent companies, subsidiaries, affiliates and associate companies (collectively merging entities), the applicant must file the horizontal Competitive Screen Analysis described in paragraphs (b), (c), (d), (e) and (f) of this section, unless the applicant affirmatively demonstrates that:

(1) The merging entities do not conduct business in the same geographic markets or

(2) The extent of the business transactions in the same geographic markets is de minimis.

(b) All data, assumptions, techniques and conclusions in the horizontal Competitive Screen Analysis must be accompanied by appropriate documentation and support.

(1) If the applicant is unable to provide any specific data required for this section, it must identify and explain how the requested data submission was satisfied and the suitability of the substitute data.

(2) The applicant may provide other analyses in addition to the horizontal Competitive Screen Analysis.

(3) The applicant may use a computer model to complete one or more steps in the horizontal Competitive Screen Analysis. The applicant must fully explain, justify and document any model used and provide descriptions of model formulation, mathematical specifications, solution algorithms, as well as the annotated model code, and any software needed to execute the model. The applicant must explain and document how inputs were developed, the assumptions underlying such inputs and any adjustments made to published data that are used as inputs. The applicant must also explain how it tested the predictive value of the model, for example, using historical data.

(c) The horizontal Competitive Screen Analysis must be completed using the following steps:

(1) Define relevant products. Identify and define all wholesale electricity products sold by the merging entities during the two years prior to the date of the merger application, including but not limited to: non-firm energy, short-term capacity (or firm energy), and long-term capacity (a contractual commitment of more than one year). If supply and demand conditions for a product vary substantially between time periods, those periods must be identified by time of day and/or load level, and analyzed separately.

(2) Identify destination markets. Identify each wholesale power sales customer or set of customers (destination market) affected by the proposed transaction. Affected customers are, at a minimum, those entities directly interconnected to any of the merging entities. Affected customers also should include those entities that have purchased electricity at wholesale from any of the merging entities during the two years prior to the date of the application. If the applicant does not identify an entity to whom the merging entities have sold electricity during the last two years as an affected customer, the applicant must provide a full explanation for each such exclusion.

(3) Identify potential suppliers. A seller may be included in a geographic market to the extent that it can economically and physically deliver generation services to the destination market. The applicant must identify potential suppliers to each destination market using the delivered price test.

(i) Delivered price test. For each destination market, the applicant must calculate the amount of relevant product a potential supplier could deliver to the destination market from owned or controlled capacity at a price, including applicable transmission and ancillary services costs, that is no more than five (5) percent above the pre-transaction market clearing price in the destination market.

(ii) The applicant must measure each potential supplier's presence in the destination market in terms of generating capacity, using at least economic capacity and available economic capacity measures. Additional measures, such as total capacity, may be presented.

(A) *Economic capacity* means the amount of generating capacity owned or controlled by a potential supplier with variable costs low enough that energy from such capacity could be economically delivered to the destination market. Prior to applying the delivered price test, the generating capacity meeting this definition must be adjusted by subtracting capacity that is committed under long-term firm sales contracts and adding capacity that is acquired under long-term firm purchase contracts (i.e., contracts with a remaining commitment of more than one year). In addition, any generating capacity of the potential supplier that is under the operational control of a third-party must be attributed to the party for whose economic benefit the capacity is operated; generating capacity may also be attributed to another supplier for other reasons deemed necessary, but the applicant must explain the reasons for doing so.

(B) *Available economic capacity* means the amount of generating capacity meeting the definition of economic capacity less the amount of generating capacity needed to serve the potential supplier's native load, i.e., the capacity needed to serve wholesale and retail power customers on whose behalf the potential supplier, by statute, franchise, regulatory requirement, or contract, has undertaken an obligation to construct and operate its system to meet their reliable electricity needs.

(C) Each potential supplier's economic capacity and available economic capacity (and any other measure used to determine the amount of relevant product that could be delivered to a destination market) must be adjusted to reflect available transmission capability to deliver each relevant product. The allocation to a potential supplier of limited capability of constrained transmission paths internal to the merging entities' systems or interconnecting the systems with other control areas must recognize both the transmission capability not subject to firm reservations by others and any firm transmission rights held by the potential supplier that are not committed to long-term transactions. For each such instance where limited transmission capability must be

allocated among potential suppliers, the applicant must explain the method used and show the results of such allocation.

If the proposed transaction would cause an interface that interconnects the transmission systems of the merging entities to become transmission facilities for which the merging entities would have a native load priority under their open access transmission tariff for use of those facilities, all of the unreserved capability of the interface must be allocated to the merging entities for purposes of the horizontal Competitive Screen Analysis, unless the applicant demonstrates one of the following: the merging entities would not have adequate economic capacity to fully use such unreserved transmission capability; the merging entities have committed a portion of the interface capability to third parties; or suppliers other than the merging entities have purchased a portion of the interface capability.

(4) Calculate market concentration. Using the amounts of generating capacity (i.e., economic capacity and available economic capacity, and any other relevant measure) determined in paragraph (c)(3) of this section, for each product in each destination market, the applicant must calculate the market share, both pre-and post-merger, for each potential supplier, the Herfindahl-Hirschman Index (HHI) statistic for the market, and the change in the HHI statistic. (The HHI statistic, which is a measure of market concentration and is a function of the number of firms in a market and their respective market shares, is calculated by summing the squares of the individual market shares, expressed as percentages, of all potential suppliers to the destination market.)

(5) Historical transaction data. To corroborate the results of the horizontal Competitive Screen Analysis, the applicant must provide historical trade data and historical transmission data. Such data should cover the two-year period preceding the filing of the application. The applicant may adjust the results of the horizontal Competitive Screen Analysis, if supported by historical trade data or historical transmission service data. Any adjusted results must be shown separately together with an explanation of all adjustments to the results of the horizontal Competitive Screen Analysis.

(d) Data to support the delivered price test. In support of the delivered price test required by paragraph (c)(3) of this section, the applicant must provide the following data and information used in calculating the economic capacity and available economic capacity that a potential supplier could deliver to a destination market. The transmission data required by paragraphs (d)(6) through (d)(8) of this section must be supplied for the merging entities' systems. Such transmission data must also be supplied for other relevant systems, to the extent data are publicly available.

(1) Generation capacity and variable cost. For each generating plant or unit owned or controlled by each potential supplier, the applicant must provide: supplier name; name of the plant or unit; primary and secondary fuel-types; nameplate capacity; summer and winter total capacity; summer and winter capacity adjusted to reflect planned and forced outages and other factors, such as fuel supply and environmental restrictions; and variable cost components, including, at a minimum, variable operation and maintenance, including both fuel and non-fuel operation and maintenance, and environmental compliance. To the extent costs are allocated among units at the same plant, allocation methods must be fully described.

(2) Long-term purchase and sales data. For each sale and purchase of capacity, the applicant must provide the following information: purchasing entity name; selling entity name; duration of the contract; provisions regarding renewal of the contract; priority or degree of interruptibility; FERC rate schedule number, if applicable; and quantity and price of capacity and/or energy purchased or sold under the contract.

(3) Native load commitments (i.e., commitments to serve wholesale and retail power customers on whose behalf the potential supplier, by statute, franchise, regulatory requirement, or contract, has undertaken an obligation to construct and operate its system to meet their reliable electricity needs). For each time period, if time-differentiated relevant products are analyzed, the applicant must provide: supplier name and hourly native load obligations for the most recent two years. If data on native load obligations are not available, the applicant must fully explain and justify any estimates of native load obligations.

(4) Transmission and ancillary service prices, and loss factors. The applicant must use in the horizontal Competitive Screen Analysis the maximum rates stated in the transmission providers' tariffs. If necessary, those rates should be converted to a dollars-per-megawatt hour basis and the conversion method explained. If a regional transmission pricing regime is in effect that departs from system-specific transmission rates, the analysis should reflect the regional pricing regime. The following data must be provided for each transmission system that would be used to deliver energy from each potential supplier to a destination market: supplier name; name of transmission system; firm point-to-point rate for each system; non-firm point-to-point rate; scheduling, system control and dispatch rate; reactive power/voltage control rate; and transmission loss factor.

(5) Destination market price. The applicant must provide, for each relevant product and destination market, market prices for the time periods corresponding to the time-differentiated products being analyzed for the most recent two years. The applicant may provide suitable proxies for market clearing prices if actual market prices are unavailable. Estimated prices must be supported and the cost or sales data used to estimate the prices must be included with the application.

(6) Transmission capability. The applicant must provide transfer capability data for each of the transmission paths, interfaces, or other facilities used by suppliers to deliver to the destination markets on an hourly basis for the most recent two years. The applicant must report simultaneous transfer capability, if it is available. Transmission capability data must include the following information: transmission path, interface, or facility name; total transfer capability (TTC); and firm available transmission capability (ATC).

(7) Transmission constraints. For each existing transmission facility that affects supplies to the destination markets and that has been constrained during the most recent two years or is expected to be constrained within the planning horizon, the applicant must provide the following information: name of all paths, interfaces, or facilities affected by the constraint; locations of the constraint and all paths, interfaces, or facilities affected by the constraint; hours of the year when the transmission constraint is binding; and the system conditions under which the constraint is binding. The applicant must include information regarding expected changes in loadings on transmission facilities due to the proposed transaction and the consequent effect on transfer capability. To the extent possible, the applicant should provide system maps showing the location of transmission facilities where binding constraints have been known or are expected to occur.

(8) Firm transmission rights. For each potential supplier to a destination market that holds firm transmission rights on a transmission path, interface,

or facility necessary to deliver energy from a potential supplier (including the supplier itself) to that market, the applicant must provide the following information: supplier name; name of transmission path interface, or facility; the FERC rate schedule number, if applicable, under which transmission service is provided; and a description of the firm transmission rights held (including, at a minimum, quantity and remaining time the rights will be held, and any relevant time restrictions on transmission use, such as peak or off-peak rights).

(9) Summary of potential suppliers' presence. The applicant must provide a summary table with the following information for each potential supplier for each destination market: potential supplier name; the supplier's total amount of economic capacity (not subject to transmission constraints); and the supplier's amount of economic capacity from which energy can be delivered to the destination market (after adjusting for transmission availability). A similar table must be provided for available economic capacity, and for any other generating capacity measure used by the applicant.

(10) Historical trade data. The applicant must provide data identifying all of the merging entities' wholesale sales and purchases of electric energy for the most recent two years. For each transaction, the applicant must include the following information: type of transaction (such as non-firm, short-term firm, long-term firm, peak, off-peak, etc.); name of purchaser; name of seller; date; duration and time period of the transaction; quantity of energy purchased or sold; energy charge per unit; megawatthours purchased or sold; price; and the delivery points used to effect the sale or purchase.

(11) Historical transmission data. The applicant must provide information concerning any transmission service denials, interruptions and curtailments on the merging entities' systems, for the most recent two years, to the extent the information is available from OASIS data, including the following information: name of the customer denied, interrupted or curtailed; type, quantity and duration of service at issue; the date and period of time involved; reason given for the denial, interruption or curtailment; the transmission path; and the reservations or other use anticipated on the affected transmission path at the time of the service denial, curtailment or interruption.

(e) Any remedies proposed by the applicant (including, for example, divestiture or participation in an independent system operator) which are intended to mitigate the adverse effect of the proposed transaction must, to the extent possible, be factored into the horizontal Competitive Screen Analysis as an additional post-transaction analysis. Any mitigation commitments that involve facilities (e.g., in connection with divestiture of generation) must specify which facilities are affected by the commitment.

(f) Additional factors. If the applicant does not propose mitigation measures and does not otherwise demonstrate that the proposed transaction will not adversely affect competition, the applicant must address: the potential for entry in the market and the role that entry could play in mitigating adverse competitive effects of the transaction; the efficiency gains that reasonably could not be achieved by other means; and whether, but for the transaction, one or more of the merging entities would be likely to fail, causing its assets to exit the market.

§ 33.4 Additional information requirements for applications resulting in a single corporate entity obtaining ownership or control over businesses that provide inputs to electric generation and electric generation products that were previously unaffiliated.

(a) If, as a result of the proposed transaction, a single corporate entity obtains ownership or control over a party to the transaction or its parent companies, subsidiaries, affiliates and associate companies that provides inputs to electric generation and another party to the transaction or its parent companies, subsidiaries, affiliates and associate companies that currently is unaffiliated with the party that provides inputs to electric generations and that provides electric generation products, the applicant must file the vertical Competitive Screen Analysis described in paragraphs (b), (c), (d) and (e) of this section, unless the applicant affirmatively demonstrates that the parties do not provide inputs to the generation of electric energy and electric generating capacity products in the same geographic markets or the extent of the inputs to the generation of electric energy (i.e., upstream relevant products) provided by the party to potential suppliers of electric generating capacity products (i.e., the downstream relevant products) to the relevant destination markets, as defined in paragraph (c)(2) of § 33.3, is *de minimis.*

(b) All data, assumptions, techniques and conclusions in the vertical Competitive Screen Analysis must be accompanied by appropriate documentation and support.

(c) The vertical Competitive Screen Analysis must be completed using the following steps:

(1) Define relevant products.

(i) Downstream relevant products. Consistent with paragraph (c)(1) of § 33.3, the applicant must identify and define all relevant products sold by a party to the transaction or its parent companies, subsidiaries, affiliates, and associate companies in relevant downstream geographic markets.

(ii) Upstream relevant products. The applicant must identify and define all relevant inputs to the generation of electricity provided by an upstream business of any of the parties to the transaction or its parent companies, subsidiaries, affiliates and associate companies in the most recent two years.

(2) Define geographic markets.

(i) Downstream geographic markets. Consistent with paragraphs (c)(2) and (c)(3) of § 33.3, the applicant must identify all geographic markets in which it or its parent companies, subsidiaries, affiliates and associate companies sells the downstream relevant products identified in paragraph (c)(1)(i) of this section.

(ii) Upstream geographic markets. The applicant must identify all geographic markets in which it or its parent companies, subsidiaries, affiliates and associate companies provides the upstream relevant products identified in paragraph (c)(1)(ii) of this section.

(3) Analyze competitive conditions.

(i) Downstream geographic market. The applicant must compute market share for each supplier in each relevant downstream geographic market and the HHI statistic for the downstream market. The applicant must provide a summary table with the following information for each relevant downstream geographic market: the economic capacity of each downstream supplier (specify the amount of such capacity served by each upstream supplier); the total amount of economic capacity in the downstream market served by each upstream supplier; the market share of economic capacity served by each upstream supplier; and the HHI statistic for the downstream market. A similar table must be provided for available economic capacity and for any other measure used by the applicant.

(ii) Upstream geographic market. The applicant must provide a summary table with the following information for each upstream relevant product in each relevant upstream geographic market: the amount of relevant product provided by each upstream supplier; the total amount of relevant product in the market; the market share of each

upstream supplier; and the HHI statistic for the upstream market.

(d) Any remedies proposed by the applicant (including, for example, divestiture or participation in an independent system operator) which are intended to mitigate the adverse effect of the proposed transaction must, to the extent possible, be factored into the vertical Competitive Screen Analysis as an additional post-transaction analysis. Any mitigation commitments that involve facilities must specify which facilities are affected by the commitment.

(e) Additional factors. If the applicant does not propose mitigation measures and does not otherwise demonstrate that the proposed transaction will not adversely affect competition, the applicant must address: the potential for entry in the market and the role that entry could play in mitigating adverse competitive effects of the transaction; the efficiency gains that reasonably could not be achieved by other means; and whether, but for the transaction, one or more of the parties to the transaction would be likely to fail, causing its assets to exit the market. The applicant must address each of the additional factors in the context of whether the proposed transaction is likely to present concerns about raising rivals' costs or anticompetitive coordination.

§ 33.5 Proposed accounting entries.

If the applicant is required to maintain its books of account in accordance with the Commission's Uniform System of Accounts (part 101 of this chapter), the applicant must present proposed accounting entries showing the effect of the transaction with sufficient detail to indicate the effects on all account balances (including amounts transferred on an interim basis), the effect on the income statement, and the effects on other relevant financial statements. The applicant must also explain how the amount of each entry was determined.

§ 33.6 Form of notice.

The applicant must file a form of notice of the application suitable for issuance in the **Federal Register**, as well as a copy of the same notice in electronic format in WordPerfect 6.1 (or other electronic format the Commission may designate) on a 3½″ diskette marked with the name of the applicant and the words ''Notice of Application.'' The Commission may require the applicant to give such local notice by publication as the Commission in its discretion may deem proper.

§ 33.7 Verification.

The original application shall be signed by a person or persons having authority with respect thereto and having knowledge of the matters therein set forth, and shall be verified under oath.

§ 33.8 Number of copies.

An original and five copies of application under this part shall be submitted. If the applicant must submit information specified in paragraphs (b), (c), (d), (e) and (f) of § 33.3 or paragraphs (b), (c), (d) and (e) of § 33.4, the applicant must submit all such information in electronic format along with a printed description and summary. The electronic version of all text documents shall be submitted in WordPerfect Version 6.1, and the electronic version of all spreadsheet documents shall be submitted in either Lotus, QuattroPro Version 6.0 or Microsoft Excel Version 4.0 (or other electronic format the Commission may designate). The printed portion of the applicant's submission must include documentation for the electronic submission, including all file names and a summary of the data contained in each file. Each column (or data item) in each separate data table or chart must be clearly labeled in accordance with the requirements of § 33.3 and § 33.4. Any units of measurement associated with numeric entries must also be included.

§ 33.9 Protective order.

If the applicant seeks to protect any portion of the application, or any attachment thereto, from public disclosure pursuant to § 388.112 of this chapter of the Commission's regulations, the applicant must include with its request for privileged treatment a proposed protective order under which the parties to the proceeding will be able to review any of the data, information, analysis or other documentation relied upon by the applicant for which privileged treatment is sought.

§ 33.10 Additional information requests by the Commission.

The Director of the Office of Electric Power Regulation, or his designee, may, by letter, require the applicant to submit additional information as is needed for Commission analysis of an application filed under this part.

[FR Doc. 98–10686 Filed 4–23–98; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CT18–1–7204b; A–1–FRL–5999–3]

Approval and Promulgation of Air Quality Implementation Plans; Connecticut; Alternative Reasonably Available Control Technology for Volatile Organic Compounds at Risdon Corporation in Danbury

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of Connecticut. This revision allows an alternative reasonably available control technology (RACT) determination for volatile organic compound (VOC) emissions at Risdon Corporation's Danbury facility which are subject to Connecticut's miscellaneous metal parts and products VOC RACT regulations. In the Final Rules Section of this **Federal Register**, EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision amendment and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no relevant adverse comments are received in response to that direct final rule, no further activity is contemplated in relation to this proposed rule. If EPA receives relevant adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this proposal. Any parties interested in commenting on this proposal should do so at this time.

DATES: Comments must be received on or before May 26, 1998.

ADDRESSES: Comments may be mailed to Susan Studlien, Deputy Director, Office of Ecosystem Protection (mail code CAA), U.S. Environmental Protection Agency, Region I, JFK Federal Bldg., Boston, MA 02203. Copies of the State submittal and EPA's technical support document are available for public inspection during normal business hours, by appointment at the Office of Ecosystem Protection, U.S. Environmental Protection Agency, Region I, One Congress Street, 11th floor, Boston, MA and, the Bureau of Air Management, Department of Environmental Protection, State Office